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CONTAINING THE

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DECIDED IN THE

COURTS OF LAST RESORT  
OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,  
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LXIII.

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# AMERICAN STATE REPORTS.

VOL. LXIII.

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**AMERICAN STATE REPORTS.**  
**VOL. LXIII.**





**CASES**  
IN THE  
**SUPREME COURT**  
OF  
**WYOMING.**

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**COWHICK v. SHINGLE.**

[5 WYOMING, 87.]

**LIMITATIONS OF ACTIONS—DEMURRER.**—If it appears upon the face of a petition that the cause of action accrued at such a period that, under the statute of limitations, no action can be brought, a demurrer, on the ground that it does not state facts sufficient to constitute a cause of action, will be sustained.

**LIMITATIONS OF ACTIONS—PART PAYMENT BY ONE DEBTOR—EFFECT OF.**—A partial payment by one of two parties, jointly and severally liable upon a promissory note, does not suspend the running of the statute of limitations in favor of the other party.

**LIMITATIONS OF ACTIONS—ACKNOWLEDGMENT OR PAYMENT BEFORE OR AFTER BAR.**—There is no distinction between the legal effect of an acknowledgment or payment made before or after the bar of the statute of limitations has attached. In either case, the legal effect thereof is to create a new cause of action.

**COMMON LAW, WHAT IS.**—As a rule, the term "common law" means both the common law of England, as opposed to statute or written law, and the statutes passed before the emigration of the first settlers of America.

**LIMITATIONS OF ACTIONS—CREATURE OF STATUTE.**—At common law, there was no limitation, as to time, upon the right to bring a personal action. Such limitations are, and always have been, pure creatures of the statute.

**STATUTES ADOPTED FROM ANOTHER STATE—CONSTRUCTION.**—If a statute of one state is adopted by another, the construction put upon the statute in the former will be adopted in the latter.

**LIMITATIONS OF ACTIONS—REQUIREMENTS AS TO PAYMENT, ACKNOWLEDGMENT, OR PROMISE.**—Neither a payment, an acknowledgment, nor a promise in writing will take a case out of the bar of the statute of limitations, unless made by the party to be charged thereby, or an agent authorized for that express purpose.

Action upon a joint and several promissory note, made by the defendants, John K. Shingle and H. Altman, to the plaintiff's intestate, John Y. Cowhick, dated January 3, 1888, for the sum of one hundred dollars, and payable one year after date, with interest. The cause of action upon the note accrued on January 7, 1889, and this action was commenced on February 2, 1894, more than five years after the cause of action accrued. It was alleged in the plaintiff's petition that the only payment made on the note was the amount of interest from its date to June 1, 1890, which interest, it was alleged, was paid to Cowhick by Shingle without the knowledge or consent of Altman. This payment was made on June 1, 1890. The defendant Shingle made default, but the defendant Altman interposed a general demurrer to the petition, relying upon the statute of limitations. The court sustained the demurrer, and rendered judgment in favor of Altman, from which the plaintiff appealed. The following sections of the Revised Statutes of 1887 were relied upon: "Sec. 2368. Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action accrues. Sec. 2369. Within five years an action upon a specialty or any agreement, contract, or promise in writing. Sec. 2381. When payment has been made upon any demand founded on contract, or a written acknowledgment thereof, or promise to pay the same, has been made and signed by the party to be charged, an action may be brought thereon within the time herein limited, after such payment, acknowledgment, or promise." The foregoing statutory provisions had been in force in the state of Wyoming since June 1, 1886. Prior to that time and subsequent to March 1, 1874, the code provision in force there, which corresponded with section 2381, above quoted, was section 21, chapter 13, of the Compiled Laws of 1876. This section read as follows: "Sec. 21. In any case founded on contract where any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same shall have been made, an action may be brought on such case within the period prescribed for the same, after such payment, acknowledgment, or promise, but such acknowledgment or promise must be in writing, signed by the party to be charged thereby."

R. W. Breckons, for the appellant.

H. Donzelmann, for the appellees.

<sup>90</sup> CLARK, J. It is the settled construction of our Code of Civil Procedure that "where it appears upon the face of the petition that the cause of action accrued at such a period that under the statute of limitations no action can be brought, the defendant may demur to the petition on the ground that the petition does not state facts sufficient to constitute a cause of action": *Sturgis v. Burton*, 8 Ohio St. 215; 72 Am. Dec. 582.

It is clear that more than five years elapsed between the date the cause of action accrued upon the note and the commencement of the suit, and hence the demurrer of the defendant <sup>91</sup> Altman was properly sustained by the court below, unless the payment of the interest by the defendant Shingle on the first day of June, 1890, had the effect of suspending the running of the statute in favor of the defendant Altman. Briefly stated, the sole remaining question for determination is: Does a partial payment by one of two parties jointly and severally liable upon a promissory note suspend the running of the statute in favor of the other?

Before proceeding to the consideration of our own statutes, so far as they bear upon this question, it may not be amiss to briefly look into the history of the law upon this subject.

The first statute in our system of jurisprudence which placed limitations upon personal actions was chapter 16 to 21 James I, enacted in 1623. In the construction of this statute and of statutes enacted at an early day, by several of the states of the Union, which were substantially like it, there was great diversity of opinion upon the question we have presented here. The leading case on this question in England is *Whitcomb v. Whiting*, Doug. 652, decided in 1781, where it was held by Lord Mansfield and his associates that "payment by one is payment for all, the one acting virtually as agent for the rest; and, in the same manner, an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due."

Willes, justice, concurring in the views expressed by Lord Mansfield, further said: "The defendant has had the advantage of the partial payment, and, therefore, must be bound by it."

This case seems to be wholly opposed in principle to the case of *Haslerig v. Bland*, 2 Vent. 151, decided many years before, but after the adoption of the statute of 21 James I. While the doctrine of *Whitcomb v. Whiting*, Doug. 652, was several times seriously questioned by eminent English judges, notably by Lord Ellenborough in *Brandram v. Wharton*, 1 Barn.



& Ald. 463, it became the generally accepted rule in England, and was such until parliament interfered in 1828, and, adopting what is known as Lord Tenterden's act, declared <sup>92</sup> among other things that no joint contractor should be in any manner affected by any written acknowledgment or promise made by their co-contractors, thus limiting the effect of written acknowledgments or new promises to the parties making them. This act, however, contained this proviso: "Provided, always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." We cite this thus fully because it is urged upon us that this statute is in substance the same as our section 2381, quoted in the statement of facts hereto appended, and inasmuch as the English courts after the adoption of the act gave the same effect to a partial payment by one of two or more joint obligors as was given in *Whitcomb v. Whiting*, Doug. 652, that hence the cases so holding are authority for the proposition that our statute should be so construed as to make a payment by one obligor effective as to the others. I cannot assent to this contention because, considering the state of the law in England at the time of the adoption of Lord Tenterden's act, as declared by the courts there, it seems clear to my mind that the effect of the proviso in that act was to leave the legal effect of a payment made by "any person whatsoever" just exactly what it had been held by the courts to have been; in fact, it might be very strongly urged that the proviso was in effect a legislative affirmation of the rule previously established by the courts, and such in effect seems to have been the view taken by the court in *Wyatt v. Hodson*, 8 Bing. 309, and by Chief Justice Shaw in *Sigourney v. Drury*, 14 Pick. 387. By this act of Lord Tenterden, the effect of the decision in *Whitcomb v. Whiting*, Doug. 652, was limited solely to partial payments, and its effect in that respect was entirely overthrown in 1856 by the act entitled the Mercantile Law Amendment Act. So that long before the territory or state of Wyoming came into existence, the doctrine of that celebrated case had met its death in the land of its birth, and as stated at pages 608 and 609 of *Wood on Limitations*: "The judgment of the profession, as well as of the people generally, as to the wisdom of the doctrine, is best evidenced <sup>93</sup> by the circumstance that it has been nearly obliterated by legislative and judicial action."

In the United States, under statutes substantially like the English statute, the doctrine of *Whitcomb v. Whiting*, Doug.

652, met with great disfavor at an early day and was wholly repudiated in several well-considered cases; among them may be mentioned as especially worthy of consideration: *Bell v. Morrison*, 1 Pet. 351; *Exeter Bank v. Sullivan*, 6 N. H. 125; *Coleman v. Fobes*, 22 Pa. St. 156; 60 Am. Dec. 75; *Levy v. Cadet*, 17 Serg. & R. 126; 17 Am. Dec. 650; *Van Keuren v. Parmelee*, 2 N. Y. 524; 51 Am. Dec. 322; *Shoemaker v. Benedict*, 11 N. Y. 176; 62 Am. Dec. 95; *Yandes v. LeFavour*, 2 Blackf. 371; *Belote v. Wynne*, 7 Yerg. 534; *Muse v. Donelson*, 2 Humph. 166; 36 Am. Dec. 309; *Lowther v. Chappell*, 8 Ala. 353; 42 Am. Dec. 643; *Succession of Voorhies*, 21 La. Ann. 659; *Walker v. Duberry*, 1 A. K. Marsh. 189; *Steele v. Jennings*, 1 McMull. 297.

In some of the above cases the acknowledgment or partial payment relied upon to take the case out of the statute was made before the bar of the statute had become complete; but in my judgment there is no distinction in principle between the legal effect of acknowledgment or payment made before or after the bar of the statute had attached; in either case the legal effect thereof is to create a new cause of action: *Muse v. Donelson*, 2 Humph. 169; 36 Am. Dec. 309; *Bell v. Morrison*, 1 Pet. 351; *Shoemaker v. Benedict*, 11 N. Y. 176; 62 Am. Dec. 95; *Allen v. O'Donald*, 28 Fed. Rep. 17, 25; *Wheelock v. Doolittle*, 18 Vt. 440, 442; 46 Am. Dec. 163; *Willoughby v. Irish*, 35 Minn. 63, 69; 59 Am. Rep. 297.

In the case of *Coleman v. Fobes*, 22 Pa. St. 156, 60 Am. Dec. 75, it is said: "We cannot but regard the case of *Whitcomb v. Whiting*, Doug. 652, which declared that a payment by one joint debtor was a new promise by all as being at the bottom of all the confusion that exists in the decisions in England and in this country on the subject of this statute in its relation to joint debtors." And from the review in that case of the English decisions it would seem that the doctrine had led to inextricable confusion, and to such extreme views that the statute<sup>94</sup> was in effect a nullity, as shown by the decision in *Goddard v. Ingram*, 3 Ad. & E., N. S., 839. In this case, the two defendants had been partners with one *Shuttleworth*; the partnership was dissolved in 1832, and, upon the dissolution, was indebted to the plaintiffs, bankers, in the sum of two thousand pounds. In 1839, *James Goddard*, one of the plaintiffs who was individually indebted to the old partnership on his single account in the sum of thirty-five pounds, drew his check upon his own bank for that sum, and placed it to the credit of the partnership. A day or two afterward, *Shuttleworth*, who was hopelessly bank-

rupt, called at the bank and expressed himself satisfied with the transaction. This was held a sufficient payment to take the case out of the statutes as to the two defendants; and, in the light of this case, it is not surprising that the Pennsylvania court should say: "To carry out this principle of *Whitcomb v. Whiting*, Doug. 652, would allow a debtor that is hopelessly bankrupt to bind others by his new promise, and even to be hired to do it, and thus far the example has led in England."

On the other hand, it is true that in many states, especially the New England states, the doctrine of *Whitcomb v. Whiting*, Doug. 652, was upheld and under statutes similar to the English statute enforced.

In *Sigourney v. Drury*, 14 Pick. 387, Chief Justice Shaw rendered an opinion sustaining the doctrine of *Whitcomb v. Whiting*, Doug. 652, and which may well be considered the leading case upon that side of the question in the United States.

*Cox v. Bailey*, 9 Ga. 467, 54 Am. Dec. 358, is another strongly reasoned case in favor of the doctrine. The same rule was held to be the law in Rhode Island, Connecticut, Maine, and other states, but it is, I think, a circumstance worthy of great consideration that within a few years after the rendition of the decisions sustaining this rule, the legislatures of nearly all the states so holding by legislative enactment declared that no joint debtor should be deprived of the benefit of the statute by reason of the fact of payment by his codebtor.

It must be admitted that at the time of the adoption of <sup>95</sup> section 21, chapter 13, of the Compiled Laws of Wyoming of 1876, to wit, December 11, 1873, in fact, at the time of the organization of the territory of Wyoming, in 1868, the rule that one joint debtor was affected by the partial payment of his codebtor in such way as to deprive him (the former) of the benefit of the statute, prevailed in only a few of the states of the Union, to wit: Connecticut, New Jersey, Rhode Island, Delaware, Georgia, Oregon, North Carolina, Missouri, and perhaps at that date Minnesota, and one or two other states. In all the other states, and in England as well, the rule had been entirely overthrown, either by judicial decision or by legislative enactment. This fact is in my mind a strong circumstance, as evidencing the judgment of the profession, and of the people as well, concerning the wisdom and propriety of the rule here contended for by the plaintiff, and is entitled to consideration in attempting to properly construe our statute upon the subject, because, when we come to construe our statute, it is a fair pre-



sumption that our legislature, when engaged in legislating upon a subject so generally acted upon in other jurisdictions, did have some regard for the general state of the law upon that subject, and we may very properly bear this in mind when we undertake to ascertain what was the legislative intention with respect to the statute. It is urged upon us that "when a statute is in general terms it is subject to the principles of the common law, and is to receive such construction as is agreeable to that law in cases of the same nature." And then it is said "that the common-law rule is clearly laid down in *Whitcomb v. Whiting*, Doug. 652." As a rule, the term "common law" means both the common law of England as opposed to statute or written law, and the statutes passed before the emigration of the first settlers of America: *Patterson v. Winn*, 5 Pet. 241; *Commonwealth v. Leach*, 1 Mass. 61. And applying this definition to the matter in hand, I am unable to perceive that there is any "common-law" rule upon the subject. At common law, there was no limitation as to time upon the right to bring a personal action. Such limitations are and always have been pure creatures of the statute, and the rule <sup>96</sup> contended for is a rule which grew up and developed in the construction of the statute of 21 James I, and in no other way. It was first announced in 1781 by Lord Mansfield in *Whitcomb v. Whiting*, Doug. 652, and, while any statement of the law made by that great judge is entitled to great weight and respect, his declarations even as to the common law are simply persuasive authority.

This brings us now to the consideration of our own statute, and before reviewing the authorities construing this and similar statutes, I will examine the statute independently of them. It is quite clear that under the statute no written acknowledgment or new promise, howsoever solemnly executed or made by one of two codebtors, could in any measure suspend the running of the statute as to the other, and this would be so whether the acknowledgment or promise was made before or after the statutory bar had attached. This being so, it would seem that inasmuch as the law does not permit one codebtor by his express promise or acknowledgment to bind the other, it would logically follow that he could not, by an act which is simply in legal effect an acknowledgment from which the law implies a promise, bind him. I am unable to escape this conclusion, and it seems to me to be abundantly justified by the authorities.

In 1866 the twenty-fourth section of the code of Ohio was identical with section 21, chapter 13, of the Compiled Laws of

Wyoming of 1876; thereafter the legislature of Ohio adopted a new code, section 4992 of which is identical with our section 2381 of the Revised Statutes of Wyoming of 1887. These sections are set forth in the statement of facts preceding this opinion. In my judgment the two sections are in substance the same; there is no sort of difference in their effect.

In *Marienthal v. Mosler*, 16 Ohio St. 570, the supreme court of Ohio, in construing the twenty-fourth section of their code used this language: "By comparing this section with the one for which it is substituted in the limitation act of 1831, and judicial constructions given to the act of 21 James I, it is apparent that the legislature did not intend to enlarge the facilities <sup>27</sup> for taking cases out of the statutory bar. Before this can now be effected by an acknowledgment of an existing debt or a promise to pay the same, it 'must be in writing, signed by the party to be charged thereby.' No change is made in the effect of a part payment of a debt. It will be seen, however, that the same effect is given to such part payment as is given to a written promise signed by the party to be charged thereby. It would seem, therefore, from analogy that the payment must be made by the party to be affected thereby, or by an agent authorized for that express purpose. In the contemplation of the statute, the part payment of a debt is regarded as evidence of a willingness and obligation to pay the residue, as conclusive as would be a personal written promise to that effect. It could not, then, have been intended to give this effect to payments other than those made by the party himself or under his immediate direction. Surely nothing short of this would warrant the assumption of a willingness to pay equal to his written promise to that effect."

In *Hance v. Hair*, 25 Ohio St. 349, it was held under the same section that "a partial payment on a joint and several promissory note by one of the several makers will not prevent the running of the statute of limitations as to the other makers." And the case of *Marienthal v. Mosler*, 16 Ohio St. 570, was expressly affirmed.

In *Kerper v. Wood*, 48 Ohio St. 613, the statute in existence and relied upon was section 4992 of the Revised Statutes of Ohio, identical with our section 2381 of the Revised Statutes of Wyoming of 1887. The court quoted from the decisions in *Marienthal v. Mosler*, 16 Ohio St. 570, and *Hance v. Hair*, 25 Ohio St. 349, and say at page 621: "These decisions give emphasis to the reason and language of the statute. A payment, or

acknowledgment or a promise in writing, will not avail to take a case out of the statutory bar unless made by the party to be charged thereby, or by an agent authorized for that express purpose."

It is quite apparent from these decisions from Ohio that the supreme court of that state regarded the two sections as the same in substance, and in view of the fact that we <sup>98</sup> adopted our statute from that state these decisions are entitled at least to more than ordinary weight in the construction of our statute.

In *Commonwealth v. Hartnett*, 3 Gray, 451, it is said that "it is common learning that the adjudged construction of the terms of a statute is enacted as well as the terms themselves, when an act which has been passed by the legislature of one state or country is afterward passed by the legislature of another."

In *Steele v. Souder*, 20 Kan. 39, Mr. Justice Brewer delivering the opinion of the court, in construing a statute identical with section 21, chapter 13, of the Compiled Laws of Wyoming of 1876, uses this language:

"The language may indeed be open to three constructions: One, that the mere fact of payment, whether by a party to the instrument or not keeps it alive as to all originally liable on it; another, that payment by one party keeps it alive as to all; and, third, that payment, like acknowledgment or promise, keeps it alive only as to the party paying. It seems to us that the latter is the true construction. No valid reason exists why payment should be more potent than acknowledgment or promise. Indeed, payment was treated by the courts as simply an evidence of acknowledgment. Such construction makes the various provisions of this section not only harmonious with each other, but with the general provisions of the statutes making each party to an instrument severally liable thereon. Severally liable, each should be severally protected. We conclude, then, that payment suspends the running of the statute only as against the party making the payment."

I think there is no room to doubt the correctness of the learned justice's views with respect to the effect of the payment. It is certain that Lord Mansfield made no distinction between the legal effect of a payment and acknowledgment; and such is the generally accepted opinion. It is true that Tindall, C. J., in *Wyatt v. Hodson*, 8 Bing. 309, attempted to draw a distinction between a payment and "an ordinary acknowledgment"; but however much force there <sup>99</sup> may be in his remarks when



applied to an ordinary oral acknowledgment, I am unable to perceive any in cases where the acknowledgment or new promise is required to be in writing and subscribed by the party.

In Nebraska the statute was as follows:

"Sec. 22. In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same, shall have been made in writing, an action may be brought in such case within the period prescribed for the same after such payment, acknowledgment, or promise."

In *Mayberry v. Willoughby*, 5 Neb. 369, 25 Am. Rep. 491, it was held that part payment by one of two joint debtors does not take the case out of the statute as to the other.

In Minnesota, the statute was:

"Sec. 24. No acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this chapter, unless the same is contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest."

In *Willoughby v. Irish*, 35 Minn. 63, 59 Am. Rep. 297, it was held in a well-considered case that: "A partial payment upon a promissory note by one of the joint and several makers thereof and indorsed upon it before the note is barred by the statute of limitations, and within six years before suit is brought is inoperative to prevent the running of the statute as to the others." (Syllabus.)

In New York the statute is identical with that of Minnesota just quoted. In *McMullen v. Rafferty*, 89 N. Y. 456, it was held that payments made by one of two joint and several makers of a note did not prevent the running of the statute as to the other, although the partial payments were made before the statutory bar had attached.

The following cases also hold that payment by one of <sup>100</sup> two joint obligors does not suspend the running of the statute as to the others: *Bush v. Stowell*, 71 Pa. St. 208, 212; 10 Am. Rep. 694; *Kallenbach v. Dickinson*, 100 Ill. 427; 39 Am. Rep. 47; *In re Sander's Estate*, 4 Misc. Rep. 343; 24 N. Y. Supp. 317; *Littlefield v. Dingwall*, 71 Mich. 223; *Tate v. Clements*, 16 Fla. 340; 26 Am. Rep. 709; *Davis v. Mann*, 43 Ill. App. 302. See, also, *Smith's Leading Cases*, pt. 11, p. 857, giving note to *Whitcomb v. Whiting*, Doug. 652; *Angell on Limitations*, 6th ed., 269, and note 281, et seq.; 3 *Parsons on Contracts*, 6th ed., 79, et seq.;



Wood on Limitations, 605; United States v. Wilder, 13 Wall. 254; 3 Kent's Commentaries, 50.

We have examined with care the cases upon the other side of this question, especially Sigourney v. Drury, 14 Pick. 387; Quimby v. Putnam, 28 Me. 419; Hewlett v. Schenck, 82 N. C. 234; Moore v. Goodwin, 109 N. C. 218; Moore v. Beaman, 111 N. C. 328; Merritt v. Day, 38 N. J. L. 32; 20 Am. Rep. 362; Cox v. Bailey, 9 Ga. 470; 54 Am. Dec. 358; McClurg v. Howard, 45 Mo. 365; 100 Am. Dec. 378; Perkins v. Barstow, 6 R. I. 505; Woonsocket Inst. v. Ballou, 16 R. I. 351.

In this last cited case, the supreme court of Rhode Island, after reviewing the cases in that state, says: "The cases are doubtless at variance with the rule now generally prevailing in the United States," and hold that the doctrine is too firmly established in that state to be altered except by a statute.

In the case of Hunter v. Robertson, 30 Ga. 479, the court, while holding to the rule declared in Cox v. Bailey, 9 Ga. 467, 54 Am. Dec. 358, as to the effect of a payment by one of two joint obligors, refuse to extend the rule so as to affect indorsers or sureties, and express grave doubts as to the correctness of the rule as to joint obligors, and use this language: "But again: If the principle is wrong when applied to joint makers—and there is no doubt in my mind that it is—shall we extend it to an indorser on the same fallacious reasons?"

In the case of McClurg v. Howard, 45 Mo. 365, 100 Am. Dec. 378, Judge Bliss, delivering the opinion of the court, and referring to <sup>101</sup> the case of Shoemaker v. Benedict, 11 N. Y. 176, 62 Am. Dec. 95, says: "I confess it would be very difficult to reply to or resist the force of the reasoning of Judge Allen, who gave the opinion of a majority of the court in that case; and were the question a new one in Missouri, I would favor the application of its doctrine to the present case, but the question was expressly decided the other way by this court in Craig v. Callaway County Court, 12 Mo. 94, and the decision was in accordance with the authorities at that time." And hence the question was considered as not an open one in Missouri. To the same effect is Campbell v. Brown, 86 N. C. 376, 380, 382; 41 Am. Rep. 464.

And thus upon examination of the authorities we find not only that the principle here contended for by the plaintiff is denied by the overwhelming weight of authority, but also that in some of the states where it is recognized as the law the courts continue to sustain it solely for the reason that it has been so decided in earlier cases.

The case of *Cross v. Allen*, 141 U. S. 528, is strongly urged upon us, as being a case which in effect denies the doctrine of *Bell v. Morrison*, 1 Pet. 351. There are some expressions in the case which give some foundation to the contention; but an examination of the case leads me to the conclusion that it was correctly decided for reasons which in nowise conflict with anything said in *Bell v. Morrison*, 1 Pet. 351.

The case arose in the state of Oregon, and the question was, whether the payment by a principal suspended the running of the statute as to a surety. Of course, this called for a construction of the statute of Oregon. The statute in force was peculiar to that state and Minnesota. In each of those states the statute had been considered by their supreme courts and held to mean that payment by any party upon an existing contract after it becomes due had the effect of causing the statute to run as to all the parties, only from the date of the last payment: *Whitaker v. Rice*, 9 Minn. 14; 86 Am. Dec. 78; *Partlow v. Singer*, 2 Or. 307; *Sutherlin v. Roberts*, 4 Or. 378.

<sup>102</sup> In these cases the peculiarities of the statute are pointed out and commented upon.

We have hereinbefore quoted the present statute of Minnesota. A comparison of that statute with the one existing at the time of the decision in *Whitaker v. Rice*, 9 Minn. 14, 86 Am. Dec. 78, will show the reasons for the different rulings in that state: See *Willoughby v. Irish*, 35 Minn. 63; 59 Am. Rep. 297. Upon the whole case I am of the opinion that the true construction of our statute (Rev. Stats. 1887, sec. 2381) is that given by the supreme court of Ohio in *Kerper v. Wood*, 48 Ohio St. 621, viz.: "A payment, an acknowledgment, or a promise in writing will not avail to take a case out of the statutory bar unless made by a party to be charged thereby, or an agent authorized for that express purpose," and that the judgment of the district court of the county of Laramie should be in all respects affirmed.

Groesbeck, C. J., and Conaway, J., concur.

**LIMITATIONS OF ACTIONS—DEMURRER—NO CAUSE OF ACTION.**—The statute of limitations is available on demurrer, upon the ground that there is no cause of action, where the complaint shows that the action has not been brought within the time allowed by law: *Notes to Sleeth v. Murphy*, 41 Am. Dec. 234; *Sturges v. Burton*, 8 Ohio St. 215; 72 Am. Dec. 582; note to *Gebhart v. Adams*, 76 Am. Dec. 704.

**LIMITATIONS OF ACTIONS.—A NEW PROMISE OR PART PAYMENT BY ONE OF TWO JOINT DEBTORS**, whether made be-

fore or after the debt is barred by the statute of limitations, takes the case out of the statute only as to the party so promising or paying. It does not suspend the running of the statute as to the other joint debtor: *Note to Boynton v. Spafford*, 53 Am. St. Rep. 276; *Walters v. Kraft*, 23 S. C. 578; 55 Am. Rep. 44, and note. *Contra*, *Burgoon v. Bixler*, 55 Md. 384; 39 Am. Rep. 417, and note.

**STATUTES ADOPTED FROM ANOTHER STATE—CONSTRUCTION.**—If a clause is taken from the constitution or statute of another state, it is deemed to have the meaning given by the courts of that state: *Laporte v. Gamewell etc. Tel. Co.*, 146 Ind. 466; 58 Am. St. Rep. 359, and note.

**LIMITATIONS OF ACTIONS—REQUIREMENTS AS TO NEW PROMISE OR ACKNOWLEDGMENT.**—An acknowledgment from which a new promise is to be implied, and which will remove the bar of the statute of limitations, must be made by the debtor, in writing, or by some person authorized to make it, and it must be made to the person holding the claim, or to some person acting for him: *Houston v. Jankowskie*, 76 Tex. 368; 18 Am. St. Rep. 57; note to *Ferguson v. Harris*, 39 Am. St. Rep. 740.

## **McFARLAND v. RAILWAY OFFICIALS AND EMPLOYÉS ACCIDENT ASSOCIATION.**

[5 WYOMING, 126.]

**INSURANCE, ACCIDENT LIMITING TIME FOR SUIT.**—It is lawful for the parties to a contract of insurance, by a provision inserted therein, to reduce or limit the time within which an action may be brought upon such contract, provided a reasonable time remains, after that allowed for the performance of conditions precedent, in which to bring suit; and, if the time limited is one year from the happening of an injury, a reasonable time remains for bringing suit where the plaintiff has more than five months in which to commence suit within the time limited after the cause of action has matured, and eight months after the company has denied its liability.

**CONTRACTS — CONSTRUCTION — MEANING AND INTENT.**—The rule of construction is the same for contracts as for statutes. The object to be attained in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used.

**INSURANCE, ACCIDENT—TIME LIMITED FOR SUIT COMMENCES AT DEATH OF INSURED.**—If a policy, insuring against death by accident, limits the time for bringing an action thereon to "one year from the date of the happening of the alleged injury," and the insured dies from injuries against which he has been insured, the limitation begins to run from his death, and not from the time that an action is maintainable, although the policy fixes a time for furnishing proofs of death, and provides that no action shall be commenced until ninety days after the proofs required are furnished. It follows, therefore, that the date of the limitation cannot be postponed by the fact that the proofs have been furnished within the time required, and that the company has, within such time, finally refused to pay.



Action brought by Mary E. McFarland on a policy of insurance upon the life of her husband. The case was heard on questions reserved for the opinion of the supreme court.

A. C. Campbell and R. W. Breckons, for the plaintiff.

Lacey & Van Devanter, for the defendant.

<sup>128</sup> **CONAWAY, J.** This action was brought on a certificate policy of accident and life insurance, whereby defendant insured the life of William W. McFarland for twelve months commencing June 10, 1891, against death by external, violent, and accidental means, in the sum of two thousand dollars, payable to plaintiff, wife of the insured, should death result within ninety days from the time of the injury.

<sup>129</sup> On May 1, 1892, the insured received injuries such as he was insured against by virtue of the certificate or policy mentioned, from which injuries he died the same day. Deceased was also insured in the same instrument against injuries not resulting in death; but this branch of the subject it is not necessary to consider.

The certificate contains the following provision: "No suit in law or equity shall be maintained on this certificate on any accidental injury or death, unless such suit be brought within one year from the date of the happening of the alleged injury, and failure to bring suit within one year shall be taken and deemed as conclusive evidence against the validity of such claim and of forfeiture of all right under this certificate." Suit was not brought on this policy or certificate within one year from the date of the happening of the injury to and the death of the insured, but was brought a little more than thirteen months after. Plaintiff admits that it was competent for the parties to limit the time for bringing suit by a provision inserted in the certificate by the association and accepted by the insured, but plaintiff insists that under the conditions of the certificate, the time of the limitation should not run "from the date of the happening of the alleged injury," but should run from the time the cause of action accrued, or, in other words, from the time when the company might be sued.

This could not be done until the expiration of ninety days after the claimant had furnished verified affirmative proof in writing of the injury, which proof was required to be furnished within seven months from the happening of such injury.



It appears that proofs of death were furnished by plaintiff on August 24, 1892, less than four months after the injury to and death of the insured. It further appears that the defendant finally denied its liability and refused to pay plaintiff's claim on September 1, 1892, just four months after such death and injury.

By written stipulation of the parties filed in the cause, it is in effect agreed that if the court should be of the opinion <sup>130</sup> that the suit is not barred by the limitations contained in the certificate, judgment shall go in favor of the plaintiff; otherwise in favor of the defendant.

Under these facts and conditions the district court finds that three difficult and important questions arise, upon which it reserves its decision and sends the cause to this court for its decision of the questions under the statute authorizing this course of procedure. The questions so reserved are these: 1. Under the allegations contained in the pleadings herein was this action commenced in time, or was the claim of the plaintiff barred at the commencement of this action by reason of the provisions of the policy sued upon, as set forth in the pleading? 2. Under the pleadings herein, did the limitations named in the policy begin to run at the death of the insured, or at the expiration of ninety days after the receipt by defendants of proofs of death, or at the time when defendants refused to pay the plaintiff's claim? 3. Under the written stipulation of the parties herein should judgment be rendered for the plaintiff or for the defendant?

The district court asks: "Was this action commenced in time?" The answer to this question must determine what the judgment shall be. But to answer this and the other questions reserved and submitted we must consider and determine from what date the limitation runs.

Three dates to be considered are indicated in the questions of the court, and in the briefs and oral arguments of counsel: 1. The date of the death of the insured, May 1, 1892; 2. The date of the final refusal of defendant to pay the claim of plaintiff, September 1, 1892; and 3. Ninety days after proofs of death were furnished, the expiration of the ninety days occurring November 24, 1892.

The question of the date from which the limitation runs is an important one, involving, as it does, leading and elementary principle in the construction of contracts, and being the question of first impression in the courts of this state. <sup>131</sup> And it

must be considered a difficult question, since eminent courts are in conflict in their views of contracts of insurance similar to the one under consideration.

These conditions require a careful consideration of the question and a careful scrutiny and weighing of the authorities on both sides.

The main contention of plaintiff seems to be that the limitation of the time for bringing suit to "one year from the date of the happening of the alleged injury" shall be held to mean one year from the date when the cause of action accrues.

The doctrine upon which the contention is based is stated in Wood on Insurance, second edition, changing the language used in the first edition to these words:

"Sec. 469. It is held in some of the cases that when a policy stipulates that no action shall be brought unless commenced within a certain time after loss or damage shall accrue, and there is a provision in the policy that the company will pay in thirty, sixty, ninety, or any other number of days after proofs of the loss have been served, the limitation does not attach until after the period which the company has in which to pay the loss has expired. The limitation does not apply until the right of action has accrued, and until the period has expired which the company has to pay the loss in, no right of action exists."

Cases from New York, Michigan, and West Virginia are cited in a note to support this view. The note continues: "But a contrary doctrine is held in some of the states": Citing cases from New Hampshire, Connecticut, Massachusetts, Vermont, and Illinois. The exhaustive researches of counsel have resulted in the collection of a large number of cases from nearly half of the states in the Union, as bearing more or less directly upon the question under discussion. It is admitted by plaintiff that it is lawful for the parties to a contract of insurance to limit the time within which an action may be brought upon such contract by a provision inserted therein; so cases cited to establish this proposition will not be mentioned in this discussion. It is only necessary <sup>132</sup> to consider cases which hold that provisions for occupying a portion of the time limited in the performance of conditions precedent to the right of action do or do not extend this time beyond the limit specified.

It is admitted by the defendant that if the time allowed for, or necessarily occupied by, the claimant, under contract of insurance, in performing such conditions precedent should include all the time specified within which suit must be brought,

or should not leave a reasonable time for that purpose, the right of action would not be lost by the lapse of the time specified. Neither if the bringing of the action was delayed beyond the time limited by the conduct of the insurer. So, cases cited to these propositions will be eliminated from this discussion.

The most of the cases bearing upon the question of extending the time limited for commencing suit by holding the limitation to run from a later date than that specified in the policy are cases of fire insurance which limit the time to a certain number of months after the loss or after the fire, and further require proofs of loss to be furnished, or other conditions precedent to the right of action to be performed for which time is allowed, or which necessarily consume time.

So far as the question has been before the federal court, the decisions are conflicting. Judges Thayer, Bunn, Hawley, and Gilbert have held in favor of the position of the plaintiff, that the limitation runs only from the time the cause of action accrues, although the policy reads a certain number of months after the loss or after the fire. Judges Deady and McKenna and the court of appeals of the District of Columbia hold directly the reverse: See *Steel v. Phenix Ins. Co.*, 51 Fed. Rep. 715; *Vette v. Clinton Fire Ins. Co.*, 30 Fed. Rep. 668; *Friezen v. Allemania Ins. Co.*, 30 Fed. Rep. 352; *McElhone v. Benefit Assn.*, 22 Wash. L. Rep. 157. Coming to the states, we find five states and one territory holding by their courts of last resort that a limitation of a certain time for beginning action after the loss or after the fire shall not run from the date of the loss or of the fire, but from the <sup>133</sup> time the cause of action accrues. We find a considerably larger number where the decisions are directly to the contrary effect, and a number where they are somewhat equivocal, and claimed by both parties, and some make a distinction between the meaning of the phrases "after the loss," and "after the fire." So if we were to decide this case according to the number of authorities, we should be compelled to decide it in favor of the defendant. But this is not a satisfactory way of determining the question of the construction of the language either of a contract or of the statute. An examination of the decisions with the reasons assigned for them is preferable.

The case of *Barber v. Fire etc. Ins. Co.*, 16 W. Va. 658, 37 Am. Rep. 800, was an action on a policy of fire insurance which made the loss payable sixty days "after due notice and proof of the same," but specifying no time within which such notice and



proof should be made, and limiting the time for bringing action to "six months next after the loss should occur." The court calls the time which must elapse before suit can be brought an indefinite time, because the claimant was not required to furnish his proofs of loss within a specified time, and holds that, in such cases, the six months' limitation runs from the time when the cause of action accrues and not before, and expires in this instance six months and sixty days after proofs of loss were furnished and finds that this was "the intent of the parties."

The later case of *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, was an action on a policy of insurance which limited the time for bringing action to six months from the date of the loss, and requiring proofs of the loss within thirty days thereafter, and allowing the insurer sixty days after proof of loss in which to make payment. The court quotes from *Barber v. Fire etc. Ins. Co.*, 16 W. Va. 658, 37 Am. Rep. 800, that the "intent of the parties to the contract was that the six months' limitation should commence to run when the cause of action accrued and not before." And the court concludes: "So that case is authority for the position: 1. That the limitation does not begin until the cause of action accrues; and 2. That it <sup>134</sup> does not begin from the actual loss—thus departing from the letter of the policy."

In Iowa, the doctrine is firmly established that under a policy of insurance, limiting the time for bringing action upon it, and requiring the performance of conditions precedent which must occupy a portion of that time, the limitation does not commence to run until the right of action accrues: See *Matt v. Iowa Mut. etc. Assn.*, 81 Iowa, 135; 25 Am. St. Rep. 483; *McConnell v. Iowa Mut. etc. Assn.*, 79 Iowa, 757; *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507; *Miller v. Hartford etc. Ins. Co.*, 70 Iowa, 704; *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308; *Quinn v. Capital Ins. Co.*, 71 Iowa, 615. Two reasons for this line of decisions are given in the different cases in Iowa. One reason is the assumption made in the West Virginia cases, that such was the intent of the parties, and a statement of it is found in *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507, a case of fire insurance, in these words: "Now it is apparent that if the literal construction of the provision in question contended for by defendant obtains, it might frequently happen that the right of action would be barred by it before such right had accrued to the assured under the other provision. It is very clear that the parties never intended that such a result should be accomplished."



The time limited in this case was "six months next after the loss shall occur." The other reason, as held in Iowa, is that there is a rule of construction of limitations, both by statute and by contract, that the limitation runs only from the time when the right of action accrues. It is stated in *McConnell v. Iowa Mut. etc. Assn.*, 79 Iowa, 757, a case of life insurance, in these words: "It is a familiar and just rule, recognized by the courts, that a bar created by statute or by contract, to an action for a breach of its conditions, by reason of the lapse of time, will not commence to run until the right of action accrues; that is, the plaintiff must have the full time given by the statute or contract after his right of action arises in which to commence his suit." The limitation in this case was six months after the death of the assured.

As to this case, it is sufficient to say that no case has been cited by counsel and none has occurred to us which holds <sup>135</sup> that a period of limitation fixed by statute has ever been changed by a court by construction. And by all the authorities the rule of construction is the same for contracts as for statutes, that the true meaning and intent of the language is to be sought.

The authority of the supreme court of Nebraska is in favor of plaintiff. *German Ins. Co. v. Fairbank*, 32 Neb. 750, 29 Am. St. Rep. 459, was an action on a policy of fire insurance limiting the time for bringing action to "six months after the loss or damage shall occur," and requiring proofs to be made in thirty days after such loss or damage, and payment to be made within ninety days after proofs furnished. The court says: "The fair and reasonable interpretation of the provisions of the policy, when construed together, is that the limitation did not begin to run from the date of the loss, but from the time the suit could have been brought." This case is followed up by the same court in *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135.

The case of *Hong Sling v. Royal Ins. Co.*, 8 Utah, 135, is in favor of the plaintiff's theory of construction. It is an action on a policy of fire insurance, limiting the time for bringing action for loss or damage by fire to "twelve months from the date of said fire," and requiring proofs of loss within thirty days after, and payment within sixty days after proof, and requiring arbitration before suit. The court holds that the action may be brought within twelve months after the cause of action accrues, and that this is what the parties intended and under-

stood by the words "within twelve months from the date of said fire," because all that time might be necessarily consumed by plaintiff in performing the conditions precedent to the right of action.

The court of appeals of New York holds that the word "loss" in the limitation clause of a policy of fire insurance has reference to the time when the loss becomes payable by the insurer and when the right of action accrues: *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235; 33 Am. Rep. 607. The supreme court of Arkansas also takes this view: *Sun Ins. Co. v. Jones*, 54 Ark. 376.

<sup>136</sup> These are all the states, so far as we are at present advised, that hold unequivocally in favor of plaintiff. There are a few others whose courts have used language claimed by plaintiff to favor this view, but which is at least doubtful, which will be considered presently.

As already stated, the great preponderance in numbers of decisions is against this view. But the courts taking this view are courts of eminence, and they are entitled to respect, and if their position is sustained by convincing reasons, mere numbers should not be allowed to prevail against them. Their number is sufficient to make a very respectable array. But the weight of these decisions as authority is greatly reduced by the fact that they do not agree as to the basis or reason upon which they rest. All of the courts which we have mentioned cite New York cases as sustaining them, so it is somewhat important to determine just how far the New York cases do sustain them.

*Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 33 Am. Rep. 607, was a suit upon a policy of fire insurance requiring proofs of loss to be furnished as soon as possible after the fire, providing that the loss should be paid within sixty days after proof, and limiting the time for commencing action to twelve months.

The court, one judge dissenting, says: "The loss should be deemed to occur when the company pays it, or may be lawfully called upon to pay it. The loss then, and not until then, practically occurs to it. These words may in some clauses refer to the destruction of the property, but it does not necessarily follow that they do in this." It is to be remarked that of the states we have mentioned as citing New York cases as authority for their decisions none but Arkansas adopts this reason for a decision. The West Virginia court makes a similar decision under a similar policy, but characterizes its decision expressly as "departing from the letter of the policy." If the word "loss" in the limitation clause meant the loss to the company by its

incurring a liability to suit so many days after proofs of loss, then the decisions follow strictly the letter of the contract. The Iowa supreme court says that under a literal construction of such provisions the <sup>137</sup> right of action might be barred before it accrued. This, of course, is inconsistent with the idea that the loss is the accruing of the right of action, as the New York and Arkansas courts hold. The Nebraska courts make the distinction expressly between "the date of the loss" and "the time the suit could have been brought," but hold that the latter is meant when the former is expressed. The case of *Hong Sling v. Royal Ins. Co.*, 8 Utah, 135, was an action on a policy limiting the time for bringing suit to twelve months from the date of the fire, and it cites a number of New York cases as holding to this latitudinarian construction, but the New York courts never held so. When a policy of fire insurance says "next after the fire" the New York courts hold that it means next after the fire. The New York cases which favor plaintiff's position turn upon the meaning of the word "loss": See *King v. Watertown Fire Ins. Co.*, 47 Hun, 1. But it must be allowed that when a policy requires proof of loss by fire to be made immediately or within a certain time after the fire which caused the loss, and payment of such loss to be made within a certain time after the submission of the proofs of the same, and that any suit is barred unless brought within a certain longer time after the loss occurs or accrues, the New York and Arkansas courts hold that the word "loss" in each place where it occurs, except the last, means the loss to the insured by fire, which he was insured against, but in the last place it means the loss to the insurer by the accruing of a right of action. So far as we are at present advised, no courts except those of New York and Arkansas have taken this view. A large proportion of the courts of the state have held differently. Some, as the courts of West Virginia and Iowa, have confessedly departed from the letter or a literal construction of the contract, in order to make the insurers liable.

Cases in favor of the contention of defendant are numerous. *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92, 33 Am. Rep. 47, was an action on a policy of fire insurance which provided that the loss or damage should be estimated according to <sup>138</sup> the actual cash value of the property at the time of the loss, and paid sixty days after proof of the same made by the assured, unless the property were replaced, or the company had given notice of its intention to repair or rebuild the damaged premises, and that no suit should be brought until after award obtained in a manner



specified, nor unless "commenced within twelve months next after the loss shall occur." Few policies are more burdened with conditions to be performed, and requiring time for their performance, before a right of action accrues, than this. The court, after stating the general and universally accepted principle, controlling the construction of laws and contracts, that the intention, as expressed, must govern, proceeds: "When did the loss occur? Manifestly, at the time the fire destroyed the property. In what consisted the loss? Obviously, in the destruction of the building by fire. We are wholly unable to perceive that language could have been used that could have rendered the meaning plainer." And the action, not having been commenced within twelve months next after the destruction of the building by fire, was held to be barred by the limitation of the policy requiring it to be "commenced within twelve months next after the loss shall occur."

Bradley v. Phoenix Ins. Co., 28 Mo. App. 7, was an action upon a policy of fire insurance which limited the time for bringing action upon it to "six months next after the loss shall occur." The policy also provided that the amount of the loss or damage was to "be estimated according to the actual cash value at the time of the loss, and to be paid sixty days after the proofs of the same shall have been made by the assured," etc. In the opinion appears the following: "When did this loss occur? Certainly, on the day, at the instant, when the property was destroyed by the fire. The term employed in the contract is apt and unambiguous." And the court held that the six months' limitation ran from the date of the fire.

Chambers v. Atlas Ins. Co., 51 Conn. 17, 50 Am. Rep. 1, was an action on a policy making losses payable sixty days after proofs furnished, and limiting the time for bringing action to "twelve <sup>130</sup> months next after any loss or damage shall occur." The court says: "This limitation is lawful and reasonable. In words of common use and plain meaning an event is referred to as a starting point, that is, the destruction of or injury to the plaintiff's property by fire. It is certain that they intended to surrender a very large portion of the time allowed them by the law; and there is nothing either in the structure of the subject matter or the contract indicating their unwillingness to make the day of that occurrence the point of departure, and to agree that the period of twelve months therefrom should cover the making of the proofs, the sixty days of grace to the defendant, and the institution of the suit.



"The contract keeps the day upon which a fire occurs entirely distinct from the day upon which the right to sue for indemnity accrues. Each is described in plain and appropriate language. We find no reason for the assumption that when the first is mentioned the last is intended, and it is not for us, by construction to give the plaintiffs what they fail to secure by agreement." And "twelve months next after any loss or damage shall occur" was held to mean twelve months next after the destruction of or injury to the insured property by fire.

*Virginia Fire etc. Ins. Co. v. Wells*, 83 Va. 736, was an action upon a policy making any loss or damage insured against payable sixty days after receipt of proofs of loss, and limiting the time for bringing action to six months next succeeding the day upon which the loss or damage is alleged to have taken place.

The court says: "It is undeniable that a policy must be construed with reference to all its provisions, like any other contract. And it may not be gainsaid that the condition of a policy should be construed, if possible, so as not to defeat the claim of the assured, which, in effecting the insurance, it was his purpose to secure. But there is no sounder rule of construction than that 'when the terms and stipulations in a contract are plain and clear we are bound to adhere to the terms as the only authentic expression of the intention of the parties,' none would be <sup>140</sup> rash enough to claim that there is obscurity or ambiguity in the language in which is expressed the prohibition to institute an action upon this policy after six months next succeeding the time when the loss is alleged to have taken place. The position is, that the sixty days during which the company is entitled to delay the payment of the loss incurred by the fire should be eliminated from the six months. Had such been the intention of the parties, how easy it would have been so to have expressed that intention. But there is nothing in the policy, which is clear and unambiguous in its terms, to indicate any such intentions." And the court held that the limitation ran from the date of the fire.

The case of *Travelers' Ins. Co. v. California Ins. Co.*, 1 N. Dak. 151, required the judicial construction of a policy of fire insurance, which limited the time for bringing action upon it to "twelve months next after the loss shall have occurred." The policy contained a familiar provision requiring proofs of loss before bringing suit. The court says: "It is undoubtedly true that a majority of the adjudications so interpret these limitations as to allow the full time to sue after the right of action

has accrued, although more than the limited time has elapsed since the loss has occurred. We cannot assent to the doctrine of these cases. They rest upon the alleged necessity of harmonizing conflicting provisions." In language convincing, and which seems truly unanswerable, the court shows that such provisions are not conflicting, unless they are such as to deprive the insured of a reasonable time in which to sue. But the court is in error in saying that the majority of adjudications are contrary to its views.

In *Blanks v. Hibernia Ins. Co.*, 36 La. Ann. 599, negotiations were protracted until the limitation was within two months of its close. This was held to be sufficient time for bringing suit.

*Fullam v. New York Union Ins. Co.*, 7 Gray, 61, 66 Am. Dec. 462, was an action upon a policy of fire insurance allowing the claimant one month in which to furnish proofs of loss, and giving the insurer three months after proof furnished in which to pay the loss, and limiting the time for bringing action to "six months next after any loss or damage shall occur." The <sup>141</sup> action, not having been commenced until after the expiration of six months from the date of the fire, was held to be barred, and judgment was ordered for the defendant. It is somewhat remarkable that the cases which hold to a contrary doctrine, all recent and evidently tending to a new departure in the construction of contracts, have, it seems, all ignored this earlier case, decided by the supreme judicial court of Massachusetts, without dissent when the Hon. Lemuel Shaw was chief justice of that tribunal.

The cases which hold that the phrase "next after the fire," in the limitation clause of a policy of fire insurance means "next after the cause of action accrues," are few. They are *Hon Sling v. Royal Ins. Co.*, 8 Utah, 135; *Steel v. Phenix Ins. Co.*, 51 Fed. Rep. 715; *Vette v. Clinton etc. Ins. Co.*, 30 Fed. Rep. 668; *Friezen v. Allemania Ins. Co.*, 30 Fed. Rep. 352. These decisions reach results more clearly in opposition, if such a thing be possible, to the meaning and intent of the parties, as expressed in the language used, than do the cases which hold the words "after the loss occurs" to mean "after the cause of action accrues." They have not in their favor even the argument of the New York court that the loss meant is the loss to the insurer by the accruing of a cause of action against him, and not the loss by fire of the property insured. And this argument, such as it is, is thoroughly refuted, if indeed it should not be said utterly overwhelmed, by the foregoing citations. It is incredible that

when the parties say six or twelve months next after the fire they mean six or twelve months after some other date or event. To this effect are the following additional cases: *State Ins. Co. v. Meesman*, 2 Wash. 459; 26 Am. St. Rep. 870; *McElroy v. Continental Ins. Co.*, 48 Kan. 200; *State Ins. Co. v. Stoffels*, 48 Kan. 205; *Allemania Ins. Co. v. Little*, 20 Ill. App. 431; *Owen v. Howard Ins. Co.*, 87 Ky. 571; *Hocking v. Howard Ins. Co.*, 130 Pa. St. 170.

California cases are cited, but they are not in favor of plaintiff. *Garido v. American Cent. Ins. Co.* (Cal., Nov. 20, 1885), 8 Pac. Rep. 512, was an action on a policy which limited the time for bringing action to "twelve months next after the loss." The property insured was destroyed by fire on February 15, 1880. The action was commenced <sup>142</sup> November 1, 1881. Negotiations for settlement were continued until January 21, 1881. The court says: "This was ample time to commence suit." And the judgment of the lower court in favor of the plaintiff was reversed because the action was not begun within the time limited. It will be observed that the "ample time" was twenty-five days. This case has never been overruled. The later case of *Case v. Sun Ins. Co.*, 83 Cal. 477, is distinguished from this case by the court, the time having been occupied by the claimant in performing the conditions of the policy, presumably with reasonable diligence, until three months after the twelve months' limitation had expired.

*Lentz v. Teutonia Fire Ins. Co.*, 96 Mich. 445, was an action on a policy of fire insurance making any loss payable sixty days after proof of the same, and limiting the time for bringing suit to "six months next after the loss shall occur." An action brought six months and twelve days after the fire which caused the loss the court held to be barred, following *Law v. New England etc. Assn.*, 94 Mich. 266, and distinguishing *Voorheis v. People's etc. Soc.*, 91 Mich. 469.

*Chandler v. St. Paul Fire etc. Ins. Co.*, 21 Minn. 85, 18 Am. Rep. 385, was an action on a policy of fire insurance, loss insured against to be paid within sixty days after proof, and containing a limitation clause in the following words: "It is expressly covenanted by the parties hereto that no suit or action against the company for the recovery of any claim under or by virtue of this policy shall be sustained in any court of law or chancery, unless commenced within the term of one year next after any claim shall occur; and in case such suit or action shall be commenced against the company after the end of one year



next after such loss or damage shall have occurred, the lapse of time shall be taken and admitted as conclusive evidence against the validity of the claim thereby attempted to be enforced, any statute of limitations to the contrary notwithstanding." The court finds in this language two inconsistent limitations, and, of course, enforces the one most unfavorable to the company whose language it is. The time "when any claim shall occur" is <sup>143</sup> held to be not earlier than when proofs are furnished, or when the company becomes liable to suit sixty days thereafter. But the time when the "loss or damage shall have occurred" is considered to be the date of the loss of the insured property by fire. So this is another case in opposition to the doctrine of the New York supreme court, that the word "loss" in the limitation clause of such a policy does not mean the loss of the insured by the destruction of his property, but does mean the loss to the insurer by having to pay to the insured the whole or some portion of his loss. The court says of the limitation clause quoted, "the first branch of this condition clearly sustains the plaintiff's contention. The expression 'claim shall occur' obviously means shall 'arise' or 'accrue.' No claim occurs or arises to the assured upon the mere happening of the loss. The giving of notice and the furnishing of satisfactory proofs are conditions precedent to be performed by the assured before they are entitled to claim the stipulated indemnity, and not until sixty days after the performance of the last of these conditions can their claim be enforced by suit. It is unnecessary to determine in this case whether, by the first branch of the condition, the time of limitation begins to run from the furnishing of proofs or sixty days thereafter. It would seem, however, that the claim exists when notice has been given and proofs furnished, although it is not payable until the expiration of sixty days."

With all due respect, we must suggest that if the assured had no claim, he had no occasion to give any notice or proof. To do so would put him in the attitude of saying: "I claim nothing and here is my notice and proof of the fact." To make a claim is one thing, to establish it by proof is quite another. The claim may be a thousand dollars, the recovery a hundred. The claim may never be realized at all, as a crop of wheat standing in the field will be lost unless harvested. He would be a rash man who would decline to file a claim against the estate of a decedent until after the time limited for filing claims, because the debt of the decedent to him would not sooner become due and ready to bring suit upon. And it would be inaccurate at least



for a court to say that <sup>144</sup> the wheat lost for want of harvesting was not wheat at all because lost and never measured. The court proceeds: "The second branch of the condition as clearly provided that unless suit is brought within one year after the occurrence of the loss, the lapse of time shall be conclusive evidence against the validity of the claim. These two limitations cannot stand together."

We have quoted at some length from this case as it differs from all the others in having the words "next after any claim shall occur" to construe, whereas others had the words "next after the loss" or "next after the fire." Were it necessary to the decision of the case at bar, we should hesitate long before concurring in the view that the claim does not arise from the loss of the property insured, and at the time of the loss. It would seem that if the assured has no just and valid claim, then he never can have, and that the notice and proof required is to fix the amount he should receive in satisfaction of such claim, and to give the insurance company an opportunity to ascertain such amount and to pay it without suit. All this work is to be done upon a claim arising from the destruction by fire of the property insured, although the claim is not yet due and the amount not settled. All authorities agree that the object to be attained in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used; and we should again hesitate long before holding that the parties intended to introduce two inconsistent limitations in the single sentence constituting the limitation clause of this contract of insurance. Such an improbable conclusion should not be tolerated if it can be avoided by any reasonable construction of the language employed. And it seems to be clear enough that by the two expressions "in one year next after any claim shall occur," and "one year next after such loss or damage shall have occurred," the parties intended to indicate one and the same identical period of time.

The weight of authority is not, as some courts have said, in favor of the proposition that the date from which the limitation of the time for bringing action on a contract of <sup>145</sup> insurance is to run may be changed by construction. Neither is the weight of authority in favor of the proposition that such a period next after the loss or next after the fire shall mean next after the cause of action accrues. The authorities to sustain either of these propositions are comparatively few in number and conflicting and unsatisfactory in the reasons assigned. In no kind

of contracts except contracts of insurance have such constructions been given to similar language, or such departures from the meaning of words been tolerated. No such construction of statutes has been made.

The decisions to the contrary effect are numerous, and they are consistent and convincing in their reasoning, because they nearly adhere to the obvious meaning of plain and unambiguous language. But could we hold that "next after the fire" or "next after the loss" means next after a cause of action accrues it would not be decisive of the case at bar.

The cases of fire insurance have been discussed merely as showing how far courts have gone or refused to go in construing the limitation clauses in policies of fire insurance. But such cases are only remotely related to the case at bar. The insurance in this case was against physical injury resulting in disability or death. The limitation clause requires that any action shall be brought "within one year from the date of the happening of the alleged injury." Even the New York courts do not hold that the injury meant is an injury to the company by the accruing of the cause of action. The case of *Cooper v. United States etc. Assn.*, 132 N. Y. 334, 28 Am. St. Rep. 581, was an action on a certificate, containing a limitation similar to that in the case at bar. The court says: "The accident received by Cooper did not injure the plaintiff or give her a right of action until death ensued. So far as she is concerned, the infliction of the wound is but the beginning and the death is the completion of the injury. Her suit must be commenced within one year from the date of the alleged accidental injury; in other words, within one year from the time of the injury to her, which was the death of her husband as the result of the accident." It is admitted that it is competent for the parties to a contract of insurance to reduce <sup>146</sup> the time within which an action may be brought on such contract. It seems immaterial whether such deduction is made by cutting off some years off the end of the term, or some months from the beginning, or both; neither whether such reduction of time is made directly in express words, or by appropriating a portion of the time to other purposes, provided a reasonable time remains for bringing the suit. In the case at bar, the plaintiff had more than five months in which to commence suit within the time limited after the cause of action had matured, and just eight months after the defendant company had denied its liability.

To the questions of the trial court, we answer: 1. This action

was not commenced in time, and the claim of plaintiff was barred before the commencement of the action; 2. The limitation began to run at the death of the insured; 3. Judgment should be rendered for the defendant.

Groesbeck, C. J., concurs.

Corn, J., did not sit in this case.

#### ON PETITION FOR REHEARING.

CONAWAY, J. No decision of the supreme court of the United States is cited in the brief of plaintiff as to the date from which the limitation of the time for bringing action runs under a policy of insurance such as the certificate sued on in this case. But in the oral argument on the petition for a rehearing, much stress is laid by plaintiff's counsel upon the case of *Steel v. Phenix Ins. Co.*, 51 Fed. Rep. 715. This case has been twice before the supreme court of the United States; first under the title of *Thompson v. Phenix Ins. Co.*, 136 U. S. 287. Thompson was a receiver who brought the action, and Steel, after one or two changes, succeeded to the receivership and was substituted as plaintiff in the action. The supreme court of the United States on this hearing declined to express any opinion upon the limitation clause of the policy, <sup>147</sup> but held that the limitation was waived by the company by accepting the premium after the fire, by assuring plaintiff that no question could be made as to the loss or its payment, and that payment would be made as soon as action could be taken.

On the second appeal, it appears from an unofficial report that a judgment of the circuit court of appeals, in favor of plaintiff, was affirmed by an equally divided court: U. S. Sup. Ct. Rep., Sr. C. P. Co., bk. 38, p. 1064.

The effect of such an affirmance has long been settled by the supreme court of the United States. In such case the court hands down no opinion, and the decision is not to be considered as settling any principle: *Benton v. Woolsey*, 12 Pet. 27; *Ettling v. Bank of United States*, 11 Wheat 59. This court cannot be expected to give to such affirmance by the supreme court of the United States greater weight as authority than that court gives it, and that court has not yet given an opinion upon the limitation clause of the policy. But we are disposed to render to the decision of the circuit court of appeals all due respect.

The case went up to the supreme court of the United States the last time from the circuit court of appeals, ninth circuit,



McKenna and Gilbert, circuit judges, and Hawley, district judge, sitting. The action was on a policy of fire insurance limiting the time for bringing action to twelve months "next after the date of the fire," and making the amount of loss or damage payable sixty days after proofs of the same made by the assured and received by the company at the office in Chicago. The majority of the court, opinion by Hawley, hold that the twelve months' limitation does not run from "the date of the fire," but from "the expiration of sixty days after the proofs of loss were furnished": *Steel v. Phenix Ins. Co.*, 51 Fed. Rep. 719. McKenna, circuit judge, in a dissenting opinion says: "The provision of the policy is as follows: 'It is expressly provided and mutually agreed that no suit or action . . . shall be sustainable, . . . unless such suit or action shall be commenced within twelve months next after such loss shall occur.'"

148 "This provision would seem to need no interpretation in other words than its own. It is so clear and direct as to baffle attempts to make it more so." It would seem that these few words more than answer all that is said in the majority opinion upon the question of limitation, and that they are, in themselves, unanswerable.

In the case at bar, the limitation is "one year from the happening of the alleged injury." This court is asked to say that this means one year and ninety days from the furnishing of proofs of such injury. It seems clear that this far transcends the bounds of construction. It is making a contract for the parties different from the contract which they made for themselves.

The petition for a rehearing is denied.

Groesbeck, C. J., and Corn, J., concur.

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**INSURANCE—LIMITATION OF TIME FOR BRINGING SUIT.** A stipulation in a policy of insurance limiting the time within which an action may be brought thereon to a time shorter than that allowed by the statute of limitations is valid, and an action begun after the lapse of the stipulated time cannot be maintained: *Notes to Kline v. National Ben. Assn.*, 60 Am. Rep. 708; *Keim v. Home etc. Ins. Co.*, 97 Am. Dec. 295; *Campbell v. American etc. Life Ins. Co.*, 29 Am. Rep. 604; *Little v. Phoenix Ins. Co.*, 25 Am. Rep. 104. The question as to when the time limited commences to run has been often discussed with respect to fire insurance policies, but the cases are comparatively few in which the question has been considered with reference to accident policies. Some cases on fire insurance hold that the limitation commences to run from the date of the fire, loss, or damage: *Chambers v. Atlas Ins. Co.*, 51 Conn. 17; 50 Am. Rep. 1; *State Ins. Co. v. Meesman*, 2 Wash.

459; 26 Am. St. Rep. 870, and note; *Hart v. Citizens' Ins. Co.*, 86 Wis. 77; 39 Am. St. Rep. 877; but others hold that it does not commence to run until the loss has been ascertained and established, and the right to bring an action exists. Two valuable cases on this question, in which the authorities are collected and weighed, are *Hart v. Citizens' Ins. Co.*, 86 Wis. 77; 39 Am. St. Rep. 877; *Sample v. London etc. Fire Ins. Co.*, 46 S. C. 491; 57 Am. St. Rep. 701.

**INSURANCE—CONSTRUCTION OF CONTRACT.**—In construing contracts of insurance, the intention of the parties must govern, which is to be ascertained from the terms and conditions of the contract: *Note to German Fire Ins. Co. v. Roost*, 60 Am. St. Rep. 715.

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## STATE v. FOSTER.

[ 5 WYOMING, 199.]

**COMMON LAW—EXISTENCE OF, IN WYOMING.**—The common law is in force in the state of Wyoming only to the extent that it has been adopted by statute.

**ASSIGNMENT FOR BENEFIT OF CREDITORS—TITLE—PRIORITY—CLAIM OF STATE OR COUNTY.**—A general assignment for the benefit of creditors passes the title of the property assigned to the assignee, free of any preference or priority of claim on the part of the state, or a county thereof. If the state or county had any preference, the assignment defeats it.

**STATES—DEBTS—PREFERENCE OR PRIORITY.**—A CONSTITUTIONAL PROVISION that no liability or obligation owned or held by the state, or any of its municipalities, shall be extinguished, except by payment thereof into the proper treasury, gives no preference or priority to the state, or a municipality thereof, over a citizen, in the payment of debts, owed by a common debtor. It has no reference to the question of such preference or priority.

**ASSIGNMENT FOR BENEFIT OF CREDITORS—DEBT DUE STATE OR COUNTY—RELEASE OF, BY PARTIAL PAYMENT.**—A partial payment, out of an insolvent estate, of a debt due to a state or county, cannot operate as a release of the unpaid portion of the debt, as provided by the assignment law, where the constitution expressly forbids the extinction of such a debt, except by payment into the proper treasury.

**OFFICERS—CUSTODY OF PUBLIC FUNDS.—STATE AND COUNTY TREASURERS** are simply custodians of public funds coming into their hands by virtue of their office, and such funds remain, at all times, public moneys while in their official possession, or in the hands of their depositaries.

**OFFICERS—TREASURERS—DEPOSITARY OF PUBLIC MONEYS AS A QUASI TRUSTEE.**—If a state or county treasurer deposits public money, in his custody, with a bank, which keeps accounts with the respective treasurers as such, the banker, having knowledge of the trust character of the funds, becomes a quasi trustee, as he stands in the shoes of the depositing treasurers.

**TRUSTS—ASSIGNMENT OF PUBLIC MONEYS FOR BENEFIT OF CREDITORS—ACTION TO RECOVER.**—Moneys re-

ceived by either a state or county treasurer are considered as public moneys, and, in case they are deposited with a banker, who afterward makes an assignment for the benefit of creditors, the state or county may maintain an action to have such moneys impressed with a trust, and recover the property, if it can be traced and identified.

**TRUSTS—ASSIGNMENT OF PUBLIC MONEYS FOR BENEFIT OF CREDITORS.—IN FOLLOWING TRUST FUNDS,** they must first be traced to the estate of the trustee or quasi trustee, and the corpus of the funds must be found. Hence, if public moneys received by a state or county treasurer, and deposited by him with a banker, who afterward assigns for the benefit of creditors, are found to be on general, and not special, deposit, thus being thrown into the mass of the funds of the bank, and applied generally to the payment of debts, so that they can be traced no further than into the insolvent assignor's possession, and into his estate, the state or county can recover nothing but the amount of moneys on hand at the time of the assignment.

**TRUSTS—REMEDY WHERE TRUST FUNDS ARE INTERMINGLED, OR DISSIPATED.**—If trust moneys are mingled with those of the trustee, the trust may be impressed upon such fund or property with which it is mingled, but if it appears that the trust moneys are dissipated or lost, there is no fund to impress with the trust, and the sole remedy of the beneficiary is a proceeding against the trustee personally.

**TRUSTS—PAYMENTS—TRUST FUND—PRESUMPTION.** A trustee is presumed to have paid out his own moneys and to have kept those belonging to the trust, and this presumption is applied if there is any money on hand at the time the trust is sought to be enforced. Hence, if public moneys received by a state or county treasurer are deposited by him with a banker, who afterward assigns for the benefit of creditors, and most of the trust funds are found to be gone, what remains in the vaults of the bank, at the time of the assignment, as well as deposits made elsewhere, will be presumed to be trust funds, but the presumption does not apply to loans made before the assignment, and which pass by it to the assignee.

Action by the state, against Foster, who was an assignee for the benefit of the creditors of Thomas A. Kent, to impress a trust upon the insolvent's estate in the hands of the assignee, for the purpose of recovering certain public moneys deposited with Kent, as a banker, by the state treasurer. The board of commissioners of Laramie county also brought a similar action on account of public moneys deposited with the insolvent, as a banker, by the treasurer of that county. The questions involved were reserved for the decision of the supreme court.

Charles N. Potter, attorney general, and Joel F. Vaile, for the state.

J. A. Van Orsdel, A. C. Campbell, and Frank H. Clark, for the county.

Baird & Churchill, and Lacey & Van Devanter, for the defendant.



**204** GROESBECK, C. J. These actions were brought in the district court for Laramie county and by that court were reserved to this court for decision upon certain important and difficult questions arising in them. They were consolidated in the trial court for the purposes of argument and determination and are so considered here, as they present substantially the same questions. The relief sought is of an equitable nature, to impress a trust in favor of the state of Wyoming and the county of Laramie to the amount of certain public funds by the respective treasurers of the state and county deposited in the banking house of Thomas A. Kent, an insolvent debtor, at Cheyenne, in this state, upon the estate of such insolvent in the hands of the defendant as assignee. The court below entered findings of fact in each case, which disclosed the following important facts: The assignor, Thomas A. Kent, was engaged in a general banking business prior to his assignment. While doing business as a banker, he received deposits from the treasurer of each of the plaintiffs, all of which were placed to the credit of such treasurer, as treasurer, and which were from time to time checked upon. At the time of the assignment, there was a balance due upon the account with the treasurer of the state of Wyoming in the sum of \$56,454.70, <sup>205</sup> and a balance due to the treasurer of the county of Laramie in the sum of \$16,153.98. The balance in favor of the state treasurer were funds belonging to the state of Wyoming, and the balance in favor of the treasurer of Laramie county was the property of said county, and these moneys had been received by said Kent with knowledge of such ownership.

Neither of the treasurers had authority to deposit any of the funds with said Kent, as banker, unless such authority is to be presumed by reason of the fact that for at least eighteen years last past the treasurers, both of the territory and the state, with the knowledge of the people and of the officials of the state, had been accustomed to deposit the funds of the territory and of the state in the manner that the funds in question were deposited; and that in like manner, for the same period of time, the treasurers of Laramie county, with the knowledge of the people and officials of the county, had likewise deposited the county funds in the custody of such treasurers, as such, with bankers in the same manner as was done in the present instance. The moneys belonging to each of the plaintiffs and all other moneys of said Kent, as banker, were paid out to depositors on checks in the ordinary course of business, excepting that there

remained in the vaults at the bank at the time of the assignment the sum of \$2,058.72 in cash, and also on deposit in other banks the sum of \$1,684.32. None of the real and personal property assigned by the said Kent to the defendant, as assignee, was either bought or paid for subsequent to any of the deposits of the public funds by either of the plaintiffs with the said Kent. Loans were made by him aggregating about \$15,000, while the greater part of said public moneys were on deposit in the said bank, but at the time when each of the said loans were made, said Kent, as banker, had, after deducting the amount of said loans, in cash, a sum largely in excess of the aggregate due to both of the plaintiffs. None of the money of either of the plaintiffs came into the hands of the defendant, unless the moneys remaining in the vaults of the bank and on deposit with other bankers are presumed to be moneys of plaintiffs, and the estate that came to his hands <sup>206</sup> has not been increased by said moneys, or their use in paying debts by the insolvent.

Upon these findings, the court made the following order reserving the causes for decision to this court: "And the court and the judge thereof does now, after due consideration, believe and find that important and difficult questions arise in this action, which render it both proper and necessary that this cause should be reserved and sent to the supreme court for its decision upon such important and difficult questions. And the court and the judge thereof believe and find that the said important and difficult questions arising in this action are as follows:

"1. Do the facts that the treasurer of the plaintiff deposited the public funds of the plaintiff with T. A. Kent, banker, in the manner above found, and with no authority except as above found, and that said Kent, as banker, paid out the sums upon checks of his depositors in the ordinary course of business, said depositors being creditors to the amounts of the checks so drawn, and that said Kent thereafter, being insolvent, made and executed a general assignment for the benefit of all his creditors, under the assignment law of the state of Wyoming, entitle the plaintiff to a lien upon, and a prior payment out of, any of the assets in the hands of the defendant as assignee for the benefit of the creditors of the said Kent as against said defendant as assignee, and as against the general creditors of said assigned estate, said assigned estate being insolvent to the extent above found? 2. If question number 1 shall be answered in the affirmative, against which particular assets is the plaintiff entitled to such lien, and out of which particular assets is the plaintiff entitled to such prior payment?"

After the submission of the questions to this court, a reargument was ordered upon the question of the priority or preference of payment of the state and the county of Laramie, and able and exhaustive arguments were made upon this question. Owing to the limited time within which the delicate questions to be disposed of must be determined, caused <sup>207</sup> by an impending change in the personnel of this court, the discussion of the points involved will, of necessity, be limited, but it is desirable that a speedy determination of the matters presented by the district court should be had owing to the reason above assigned, the magnitude of the case, the importance of the questions involved, and the necessity of facilitating the settlement of the estate of the insolvent.

1. It is urged with great force that under the common law and the constitution of this state, the state and the county of Laramie have a preference or priority of payment over the general creditors of the insolvent debtor in the distribution of his estate in the hands of his assignee by a deed of assignment executed by the debtor in trust for all his creditors without preference or priority, under the provisions of the voluntary assignment statute of this state: Sess. Laws 1890, c. 51. It is asserted that the state of Wyoming and her municipality, the county of Laramie, as a subdivision thereof for certain governmental purposes, has succeeded to the prerogative of the British sovereign, that his debt should be preferred to that of his subject, and that this prerogative has become to the states of the American republic an attribute and incident of sovereignty. Two familiar maxims are quoted as the quintessence of the British law: "*Quando jus domini regis et subditi insimul concurrunt, jus regis praeferri debet,*" and "*Thesaurus regis est vinculum pacis et bellorum nervus.*" These maxims, it is said, should apply to the state, and her revenues should be protected with as much solicitude as those of the British king, as though her treasury may not be the "bond of peace and the sinew of wars," yet she stands in the attitude *parens patriae*, charged as she is directly through her municipal subdivisions with the government of the people; in the enforcement of the law and the rights of her citizen through her tribunals of justice; in the maintenance of the public order and the execution of the laws; in the education of the young; in the support of the indigent; in the work of internal improvement, and in the various agencies of government that the state controls in the interest of her citizens. As liens are created by her positive <sup>208</sup> statute upon



both realty and personalty on which they are imposed, it is contended as much concern should be manifested in the preservation intact of the public moneys which are the fruits of taxation.

The source of this power and right of preference, it is asserted, is grounded mainly on the common law and upon certain provisions of our constitution.

Whatever of the common law is in force in this jurisdiction is here by the terms of the statute adopting it, enacted at an early day and incorporated in section 498 of the Revised Statutes of Wyoming. It reads as follows: "The common law of England, as modified by judicial decisions, so far as the same is of a general nature, and not inapplicable, and all declaratory or remedial acts or statutes made in aid of, or to supply the defects of the common law, prior to the fourth year of James I (excepting the second section of the sixth chapter of 43 Elizabeth, the eighth chapter of 13 Elizabeth, and the ninth chapter of 37 Henry VIII), and which are of a general nature and not local to England, shall be the rule of decision in this territory (state) when not inconsistent with the laws thereof, and shall be considered as of full force until repealed by legislative authority."

The British statutes excepted from this act of adoption are: "An act for avoiding trifling and frivolous suits in her majesty's courts at Westminster" (Stats. 43 Eliz., c. 6, sec. 2), "An act against usury" (Stats. 13 Eliz., c. 8), "A bill against usury" (Stats. 37 Henry VIII, c. 9). The period fixed for transplanting the common law into this country and the time in which it is considered as having effect in this jurisdiction is the fourth year of James I, the period when the first territorial or colonial government was established in America and with it the common law of England as it then existed: *Penny v. Little*, 3 Scam. 304. The charter to Gates, Somers, and others for the colony of Virginia was granted in the fourth year of that monarch, on the tenth day of April, 1606, and by it provision was made for the establishment of a government in the wilds of America <sup>209</sup> which should rest upon the reason, the experience, and the luster of the British jurisprudence. By our statute, the common law is adopted with "all declaratory and remedial acts or statutes made in aid of or to supply the defects of the common law," prior to the time when the first colonial government was established by England upon American soil, with the exception of certain statutes mentioned, and these curative and remedial

statutes must be as well consulted as the common law in order to ascertain the body of law adopted here.

The right of the crown to have its debts preferred was of very ancient origin and was recognized in Magna Charta. It was held to be an incident to sovereignty, and not as a personal right attaching to the king's person. It was modified by a number of statutes which were incorporated in the body of the common law by our act of adoption. These were the statutes of 9 Henry III, statute 1, chapter 18, of 25 Edward III, chapter 19, and of 33 Henry VIII, chapter 39. By them, the prerogative of the crown was shorn of its original oppressive character. Anciently, the subject had first to pay "gree" or satisfaction to the king of the king's debt, before he could have execution against the king's debtor; and if he sued the king's debtor without first satisfying the king's debt, the writ of protection ran against the subject seeking his remedy or process against the king's debtor. The last statute in point of time (33 Henry VIII, c. 39), as construed in the case of *Giles v. Grover*, 9 Bing. 515, in the house of lords, decided in 1832, as appears from the opinions of the judges, permitted the subject to secure judgment and obtain process thereon against the king's debtor, without first making "gree" or satisfaction, but the king had the right to pursue his remedy concurrently with the debtor even after the judgment of the latter and even if process had been issued and executed thereon, if the title to the property remained unaltered in the debtor; and the king's process in such a case, although issued after the process of the subject, was entitled to preference. The proceedings between sovereign and subject is aptly termed in the opinion of one of the judges "a <sup>210</sup> race with the crown." It was held that the sheriff holding the property of the king's debtor, seized under a fieri facias but not sold, could not defeat the subsequent process of the king, either by extent in chief or in aid, which were in effect deemed the same, for the reason that before the sale of the property seized under the fieri facias the title to the property had not been divested from the debtor, and the king's process should have preference, although subsequent to that of the subject creditor. It was conceded upon the argument in the case, and so held by the court, that the crown could not avoid an equitable mortgage, or the lien of a factor or of a wharfinger or of "a bona fide assignment in trust for creditors": See *Giles v. Grover*, 9 Bing. 520, opinion of Patteson, J. This is stated in *Tidd's Practice*, 1052, 1053, *King v. Watson*, 3 Price, 6, and

is undoubtedly the rule in England that the transfer bona fide of the debtor's property while he has absolute dominion over it defeats the king's prerogative right, and his preference and priority is lost. So it was held in the much cited case of *State v. Bank of Maryland*, 6 Gill & J. 228, 26 Am. Dec. 561, and in a state that recognizes this common-law prerogative of the king as in force and applying to the state. So, as a valid deed of assignment for the benefit of creditors under the common law is a transfer of the title by the debtor to his assignee, and vests the property in the assignee secure from any claim of preference or priority of payment of the king, it is clear that the assignment of Thomas A. Kent, the insolvent, executed before the inception of these actions at bar, would defeat the preference of the state and of any municipality therein, even if the common law, as modified by British statutes, adopted by our statute with it, were in this particular the law of Wyoming: *Bump on Fraudulent Conveyances*, 330; *Burrill on Assignments*, sec. 6.

In the case of *Seay v. Bank of Rome*, 66 Ga. 615, it is remarked that the assignee of an insolvent debtor "takes the assets subject to the preference and priorities that the law gives," and the Georgia code, section 1493, is cited in support of that proposition. This section reads: "When a bank <sup>211</sup> surrenders its charter, or the use thereof, it may make, in good faith, an assignment of all its effects for the payment of its debts, as natural persons may, but it cannot thereby prevent such preference among its creditors as the law gives." The common-law rule is, that a general assignment passes the title. Our statute provides the same thing in effect, and it does not provide that the title shall not pass. It authorizes a debtor to make a general assignment without preference or priority of creditors; it requires that this shall be done by indenture, which is the usual method of passing title; it speaks of the assignment as "conveying" an interest; the assignee is empowered to sell by virtue of the indenture and recording, and without waiting for an order of the court; the power of the court over the estate is, by the words of the statute, simply a "supervising" power; another section contemplates that the execution and filing of the assignment shall "transfer the property of the assignor"; another provides that exempt property does not pass to the assignee; and if property is fraudulently conveyed by the assignor, the assignee may recover it or its value from the person who has fraudulently obtained it: *Sess. Laws 1890*, c. 51.

Hence, neither under the common law nor our statute of



assignments, could the state and the county have any preference or priority, as the title passing by the deed of assignment, the assignment and transfer defeats the preference or priority of the sovereign. It is not certain that the common-law prerogative of the king in this respect is applicable in this country, where it has been held to be contrary to the spirit of our institutions. It has been adopted by statute by act of Congress, and it would seem a proper exercise of the legislative power. The decisions of American courts are somewhat conflicting. They are collected in a footnote to the case of *Middlesex County v. State Bank*, 30 N. J. Eq. 311, where the opinion of the vice-chancellor denying the priority is affirmed upon his opinion: *Middlesex County v. State Bank*, 29 N. J. Eq. 268. We do not care to decide this point, as it is unnecessary to do so. The assignment of the insolvent's property, <sup>212</sup> both under common law and under our statute, passed the title, and no process could thereafter run against the property, either that of the state or the citizen, and the preference or prior right, if any existed, is thereby defeated.

The following constitutional provision is invoked as giving a preference or priority to the state and its municipalities over the citizen: No obligation or liability of any person, association, or corporation, held or owned by the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, or postponed, or in any way diminished by the legislature; nor shall such liability or obligation be extinguished except by the payment thereof into the proper treasury": Const., art. 2, sec. 40. The Revised Statutes of the territory of 1887, and the territorial session laws following (1888 and 1890) were declared by an act of the first state legislature to be the laws of the state, in so far as they do not conflict with and are not repugnant to the provisions of the constitution: Sess. Laws 1890-91, c. 35. It is contended that the territorial assignment law (Sess. Laws 1890, c. 51), in so far as it compels a release of the claim of a creditor in full upon the acceptance of the final dividend on the distribution of the estate of an insolvent, cannot apply to the state or the county, because such a provision is repugnant to the constitutional provision upon which the state and the county must receive the full amount of their respective claims. The provision of the constitution is that no liability or obligation owned or held by the state or any of its municipalities shall be extinguished except by payment thereof into the proper treasury. It does not create, either in express terms or by im-

plication, a preference or priority in favor of either the state or its municipality as against its citizen in the payment of the debts of a common debtor, and has no reference to the question of such priority or preference. It seems that if Kent, the insolvent assignor, is a debtor to the state and to the county of Laramie, his debt to either of them cannot be extinguished by a partial payment. A payment or dividend out of the insolvent estate might be made pro tanto, but could not operate <sup>213</sup> as a release of the unpaid portion of the debt, as the assignment law provides, because the constitution expressly forbids the extinction of such a debt except by payment into the proper treasury.

2. The remaining question to be decided is that of following the trust moneys belonging to the state and the county into the estate of Kent, the insolvent debtor.

Upon the deposit of these public funds in his bank, he became a quasi trustee, as he stood in the shoes of the depositing treasurers, having knowledge of the trust character of the funds and having kept his accounts with the respective treasurers as such. Under our constitutional and statutory provisions, it is clear that the state and the county treasurers are but custodians of the public funds coming into their hands by virtue of their office, and that such moneys remain at all times public moneys while in their official possession or in the hands of their depositaries. The statutes of this state are similar to those of Colorado, and in that state it is held that county moneys received and collected by a county treasurer belong to the county, which may maintain an action to recover the same: *McClure v. Board of Commrs.*, 19 Colo. 122; *Sauer v. Nevadaville*, 14 Colo. 54; see *State v. McFetridge*, 84 Wis. 473. In Michigan it was held that a state treasurer as to state funds held a different relation to the state than a county treasurer bears to his county, under the peculiar provisions of the statutes of that state (*Perley v. County of Muskegon*, 32 Mich. 132, 20 Am. Rep. 637), but we think no such distinction exists here. In the Michigan case just cited, it was intimated that, in the case of the death of the county treasurer, the moneys held by him in his official capacity would go to his administrator, and not to his successor, but our statute requires the executor or administrator of a deceased county treasurer, under severe penalties and increased liabilities, to deliver up, on demand, the books, moneys, and papers of the deceased county treasurer: Rev. Stats., sec. 1828. Then, as is ordinarily the case under like statutory provisions to ours, it appears the moneys received by either a state or a

county treasurer <sup>214</sup> in this state by virtue of the office, are considered as public moneys, and the state or the county may maintain an action like the ones at bar to charge with a trust the property purchased with such public moneys, or the moneys in whatever form or transmutations they may have undergone, provided they can be traced or identified. A difficulty arises under the findings of the district court in these cases, as it does not appear that the public funds deposited with Kent can be traced or have been traced into any specific fund or property. Their deposit is found to be a general and not a special deposit, and they were evidently not to be returned in specie, but in equivalents. They can be traced to the possession of the insolvent, the assignor, and into his estate, but no further. No particular property is discovered into which they were converted or found their way, or for which they were substituted, but the findings, on the contrary, are that they went into the mass of the funds of the bank and were applied generally to the payment of the debtors, including the mass of depositors in the usual course of business. There is no property of the insolvent estate, other than the moneys on hand and the balances due and owing to Kent from other banks at the time of his assignment, which can be considered to represent any portion of the trust moneys. Some loans were negotiated by Kent and passed by the assignment, but at the time of the assignment there was in the vaults of the bank only the sum of \$2,058.72 in cash and on deposits in other banks the sum of \$1,684.32.

In following trust funds, they must first be traced to the estate of the trustee or quasi trustee, and the corpus of the funds must be found. It must be in esse in some form, or it cannot be identified. Where the trust moneys are mingled with those of the trustee, the trust may be impressed upon such fund or property with which it is mingled, but if it appears that the trust moneys are dissipated or lost, there is no fund to impress with the trust, and the sole remedy of the beneficiary is a proceeding against the trustee personally. Where he is solvent, this is the usual remedy pursued, as by judgment and execution, the whole estate can <sup>215</sup> be impressed with the amount of the judgment. Some of the courts have held as the "modern" equity doctrine that all that is necessary is to trace the trust moneys into the estate of the trustee, which then becomes impressed with the trust. This was the rule established by a number of cases in the supreme court of Wisconsin until a return to the general rule was announced in *Nonotuck Silk Co. v.*



Flanders, 87 Wis. 237, and the former cases were overruled. The leading cases on the subject are those of *Cavin v. Gleason*, 105 N. Y. 256, 262, *Little v. Chadwick*, 151 Mass. 109, and *Slater v. Oriental Mills*, 18 R. I. 352.

That the money constituting the trust may have been wrongfully converted by the defaulting or delinquent trustee does not seem to alter the situation as some of the courts hold. There is no peculiar sanctity that surrounds an action *ex delicto*, as distinguished from an action *ex contractu*, at law, so far as the obtaining satisfaction of any judgment is obtained, and, when equity is invoked in the former cases, equitable rules must be applied. Where no specific lien is created by contract or the acts of the parties, none exists. The only course open in equity is to discover the corpus of the trust fund, or to follow the changes and transmutations of the trust moneys into some particular property that can be charged with the trust, saving the rights of innocent purchasers for value. The courts generally have gone as far as it seems possible in holding that the presumption always is that the trustee has used his own funds in his business operations, and if there be any money on hand at the time the trust is sought to be enforced, that presumption controls. So the trustee who has blended trust moneys with his own is not permitted to say that he has used trust moneys when he had a right to use his own. This appears to be one of the principles that governed the decision in the famous case of *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696, which overruled some prior English decisions. It is to the effect that if a person who holds money as a trustee, or in a fiduciary character, pays it to his account at his bankers and mixes it with his own money, and afterward draws out sums by checks <sup>216</sup> in the ordinary manner, the drawer must be taken to have drawn out his own moneys in preference to the trust money. This principle pervades some of the cases which adopt the rule that the entire estate of the trustee is impressed with the trust moneys traced to it. In *Kimmel v. Dickson*, 5 S. Dak. 221, 49 Am. St. Rep. 869, the moneys found in a defunct bank amounted to \$259.71, while the amount left there by the plaintiff before it failed to be used for the payment of his note was \$265. The case was decided upon the authority of *Ellicott v. Barnes*, 31 Kan. 170, *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90, and upon the case of *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287, which had then been overruled by *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, but the order of the trial court was affirmed, and that

was that the receiver of the insolvent bank pay to the plaintiff "the sum found in the bank at the time of its failure, although it was less than the sum left there for the specific purpose of paying the note. So it was in the case of *Massey v. Fisher*, 62 Fed. Rep. 958, very recently decided. In the course of the opinion the court remarks: "It is not important that the plaintiff's money bore no mark and cannot be identified. It is sufficient to trace it into the bank's vaults and find that a sum equal to it (and presumably representing it) remained continuously there until the receiver took it. The modern rules of equity require no more." Some of the cases cited by the learned judge go farther than he, but his conclusion, though reached at the extreme limits of the rule, seems correct. The trust moneys here are traced to the bank vaults and to deposits made elsewhere, and the sum found there represents a portion of it. The amount of moneys on hand at the time of the assignment to the defendant for the benefit of the creditors of Kent constitutes the only portion of the trust moneys that can be traced and identified as trust moneys, and these only under the fiction or presumption that seems to be a well-established rule of equity, that the trustee is presumed to have paid out his own moneys and kept those belonging to the trust. This was tacitly conceded upon the argument by counsel for the defendant.

**217** The commercial paper representing loans made to different parties before the assignment and passing by it to the assignee, as the court below finds, were severally exchanged for moneys when there was sufficient funds of Kent on hand out of which the loans were made. Upon the presumption as established in equity and referred to above, it must be held that these loans were made from the moneys of the trustee and not from the trust funds, and should not be impressed with the trust.

As the inquiries of the district court have been answered generally by this opinion, it will not be necessary to specifically answer the questions propounded.

Corn and Blake, JJ., concur.

Hon. J. W. Blake, judge of the district court for the second judicial district, sat in lieu of Mr. Justice Conaway, who was disqualified by reason of his interest in the proceeding.

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**COMMON LAW—EXISTENCE OF, IN THIS COUNTRY.—**Only so much of the common law as is applicable to our circumstances and customs is recognized as part of our common law: Note to *Reno Smelting Works v. Stevenson*, 19 Am. St. Rep. 374. Compare note to *Parsons v. Lindsay*, 13 Am. St. Rep. 290.

**ASSIGNMENT FOR BENEFIT OF CREDITORS—CLAIM OF STATE—PRIORITY.**—The claims of the state are prior to those of other creditors: *Note to Yeatman v. King*, 33 Am. St. Rep. 804; but the priority of the state is lost by a valid assignment for the benefit of creditors: *State v. Bank of Maryland*, 6 Gill & J. 205; 26 Am. Dec. 561. The money of a general depositor in a bank is the property of the bank, and subject to assignment by it for the benefit of creditors: *Hawes v. Blackwell*, 107 N. C. 196; 22 Am. St. Rep. 870.

**TRUSTS—FOLLOWING TRUST FUNDS—IDENTIFICATION—PRESUMPTION.**—A trust creditor cannot obtain a lien or preference over other creditors of an insolvent estate until he makes it appear that the fund or property of the debtor which he seeks to affect with such lien or preference includes the trust property or the proceeds thereof. The trust fund or its proceeds must be traceable. Hence, the *cestui que trust*, after dissipation of the trust fund, has no longer any remedy in equity to fix a charge upon the estate of such trustee, but must come in and share with the general creditors: *Ferchen v. Arndt*, 26 Or. 121; 46 Am. St. Rep. 603, and monographic note thereto on the right to follow trust funds. See, also, *Springfield Inst. v. Copeland*, 160 Mass. 380; 39 Am. St. Rep. 489. If trust funds are traced into assets of the unfaithful trustee, or one who has knowledge of the character of the funds, they become a preferred charge upon the entire assets with which they are mingled, no matter of what such assets consist: *Myers v. Board of Education*, 51 Kan. 87; 37 Am. St. Rep. 263. Compare monographic note to *Union Nat. Bank v. Goetz*, 32 Am. St. Rep. 125-130, on the right to pursue and recover trust funds. If a trustee draws checks upon his bank account, he will be presumed to have drawn out his own funds, and to have left moneys held in trust: *Drovers' etc. Nat. Bank v. Roller*, 85 Md. 495; 60 Am. St. Rep. 344, and note.

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## SNYDER v. STATE.

[5 WYOMING, 313.]

**OFFICERS—OFFICIAL BONDS—MISAPPLICATION OF FUNDS AFTER SURETY'S DEATH—LIABILITY OF HIS ESTATE.**—The estate of a deceased surety upon an official bond is liable for any misapplication of funds, by the officer, occurring after the surety's death.

**OFFICERS—OFFICIAL BONDS—MISAPPLICATION OF FUNDS AFTER SURETY'S DEATH—LIABILITY OF HIS ESTATE.**—If a testator signs an official bond as surety, his estate, after his decease, is liable for a misapplication of funds by the officer, although it is made after a sole executrix and legatee has given a bond to pay the debts of the testator.

**OFFICERS—OFFICIAL BONDS—CHANGE OF LAW—RELEASE OF SURETIES.**—A change in the law, after an official bond is given, providing for a different kind of a bond, does not release the sureties on the former bond for any misapplication of funds occurring after such change, if the subject matter of the action is not affected by the change.

**OFFICERS — INCREASING RESPONSIBILITIES BY**



**CHANGE OF LAW—RELEASE OF SURETIES.**—Increasing the responsibilities of a public officer, in matters properly pertaining to his office, does not have the effect of discharging the sureties on his bond from liability. Hence, if the fees of his office, at the time he is elected, are his compensation, a subsequent law requiring him to account for them does not release the sureties on his official bond from liability for the officer's failure to account for money deposited with him in his official capacity.

**EXECUTORS AND ADMINISTRATORS—TERM "DEBTS" INCLUDES WHAT.**—The term "debts," as used in statutes relating to the estates of deceased persons, is not limited to such as are strictly legal debts, but manifestly includes every claim and demand by a creditor, whether recoverable at law or in equity.

Suit in the name of the state, for the use of Catherine Donnelly, upon a bond given by a sole executrix and legatee, against Priscilla M. Snyder, as principal, and Joseph A. Breckons, Ephraim S. Johnston, and Abram Underwood, as sureties. On September 11, 1890, one Samuel Atkinson was elected as a clerk of the court for the term ending January 2, 1893. He executed an official bond with Albert D. Kelley, John K. Jeffrey, Albert C. Snyder, and George L. Beard, as sureties, conditioned that he should account for all moneys coming into his hands as clerk, and that he should otherwise faithfully discharge the duties of his office. On March 17, 1892, there was paid into his hands, as clerk, in a certain condemnation proceeding, the sum of three hundred and fifty-seven dollars and fifty cents, for the use of Catherine Donnelly. He never accounted for this money. It was alleged in the petition that the condition of the bond of Priscilla M. Snyder had been broken, and judgment was prayed for the sum named, with interest. A copy of each bond was attached to the petition. A general demurrer to the petition was overruled, judgment was awarded in favor of Catherine Donnelly, and the defendants appealed by prosecuting a writ of error. The clerk of the court was elected at the first state election. At that time the laws of the territory provided fees for such officer which were retained as his compensation. The constitution required that all officers, with some minor exceptions, should be paid fixed salaries, and that the fees should be paid into the proper treasury. The first state legislature enacted a law to that effect, fixing the salary of the clerk, as well as of other officers.

R. W. Breckons, for the appellants.

Baird & Churchill, for the appellee.

<sup>322</sup> CONAWAY, J. Albert C. Snyder was one of the sureties upon the official bond of Samuel Atkinson as clerk of the district court of the first judicial district of the state of Wyoming for the county of Laramie, for the term ending January 2, 1893. On March 17, 1892, the sum of three hundred and fifty-seven dollars and fifty cents was paid into court, into <sup>323</sup> the hands of said Atkinson as clerk, for the use of Catherine Donnelly. Atkinson never accounted for this money.

Albert C. Snyder died on March 23, 1891. He left a will, of which Priscilla M. Snyder, his wife, and one of the plaintiffs in error, is executrix. She is also sole legatee. On June 22, 1891, she gave a bond pursuant to an order of court and under a statute authorizing such proceeding to "faithfully discharge all of the just debts and obligations of the late Albert C. Snyder, according to law." She thereupon took possession of all of the assets of the decedent. Catherine Donnelly, by leave of the court, presented her claim on account of the above facts to Priscilla M. Snyder as executrix and sole legatee of Albert C. Snyder, on November 11, 1893, and caused a demand and proof of claim to be so presented on November 16, 1893, which claim had been neither approved nor rejected at the commencement of this action on January 31, 1894. To a petition setting up these facts a general demurrer was overruled. Plaintiffs in error declining to plead further, judgment was rendered against them for the amount of the claim, with interest from October 20, 1893, and costs.

The overruling of this demurrer and the giving of this judgment is assigned as error. Plaintiffs in error present three reasons in support of their assignments of error.

"1. Upon the death of Snyder, he, and his heirs at present, were released from the bond for any misapplication of funds occurring after his death." No authority is given in support of this proposition. The authorities are directly opposed to it: 24 Am. & Eng. Ency. of Law, 767, and authorities there cited.

"2. After the bond in question was given, the law was changed, providing for a different kind of bond, thus releasing the sureties on the former bond for any misapplication occurring after the change in the law." The argument is that the liability of the clerk was increased by the change in the law which requires him to account for the fees of the office, which were formerly his compensation. We cannot agree to the proposition that an increase in the responsibilities of the clerk in matters which properly pertain <sup>324</sup> to his office has the effect

to discharge his sureties from all liability upon his bond. The liability of the clerk was not increased as to the subject matter of this action. The responsibility of the clerk of the court on his official bond for money deposited with him in his official capacity existed at the time of his election and qualification.

"3. Under the terms of the legatee's bond in question, no recovery can be had for a misapplication occurring after the bond is given." The bond was conditioned for the faithful discharge of "all of the just debts and obligations" of the deceased. It is urged that the word "obligations" should be rejected as surplusage, because the statute required only a bond for the faithful discharge of "debts." Plaintiffs in error say in their brief: "It has always been held that one of the distinguishing features of the 'debt' is, that it is a fixed and determinate sum and due from one person to another. And it is further claimed that it results from this definition that the sureties on the bond of the executrix became responsible only for all sums 'fixed and certain,' which Snyder owed at the time of his death."

There is no authority cited in support of this conclusion. We cannot approve of the proposition that under our statute the executor or administrator of a decedent becomes liable with his sureties only for such liabilities as are "fixed and certain," at the time of decedent's death. The following is a better statement of the law: "The term 'debts,' as used in the statutes relating to the estates of deceased persons, is not limited to such as are strictly legal debts, but manifestly includes every claim and demand by a creditor, whether recoverable at law or in equity": 5 Am. & Eng. Ency. of Law, 143.

Whether the word "obligations" be rejected as surplusage or not, the result is the same. The judgment is affirmed.

Groesbeck, C. J., and Potter, J., concur.

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**OFFICERS—OFFICIAL BONDS—LIABILITY OF ESTATE OF SURETY AFTER HIS DEATH.**—A contract of suretyship is not terminated by the death of the surety: Notes to Chamberlain v. Dunlop, 22 Am. St. Rep. 814; Commonwealth v. Stub, 51 Am. Dec. 524; and his estate is liable for a breach of the principal's obligation occurring after the surety's death: Royal Ins. Co. v. Davies, 40 Iowa, 469; 20 Am. Rep. 581. One who obligates himself that another will faithfully perform the duties of an office is liable upon the default in the performance of those duties, although such default takes place after the death of such surety: Green v. Young, 8 Greenl. 14; 22 Am. Dec. 218; Susong v. Vaiden, 10 S. C. 247; 30 Am. Rep. 50. The estate of a deceased surety on a bond given by an insurance agent for faithful conduct and accounting is liable for moneys coming into the agent's hands after the surety's death: Rapp v. Phoenix Ins. Co., 113 Ill. 390; 55 Am. Rep. 427. The es-



tate of a deceased surety upon a guardian's bond, joint and several in form, remains liable after his death: *Douglass v. Ferris*, 138 N. Y. 192; 34 Am. St. Rep. 435. Compare *Shackamaxon Bank v. Yard*, 150 Pa. St. 351; 30 Am. St. Rep. 807.

**OFFICERS—INCREASE OF DUTIES—EFFECT OF, UPON OFFICIAL BONDS.**—Sureties upon the bond of a public officer are not discharged by the imposition, upon the principals, by the legislature, of further duties and obligations of a nature and character similar to those already taken: *County of Spokane v. Allen*, 9 Wash. 229; 43 Am. St. Rep. 830, and note; but imposing duties of another description, and not appropriate to the office, would discharge sureties not coming within such contemplation: Note to *First Nat. Bank v. Gerke*, 6 Am. St. Rep. 460; *Salem v. McClintock*, 59 Am. St. Rep. 334; *Singer Mfg. Co. v. Reynolds*, 60 Am. St. Rep. 419.

## MAHONEY v. STATE.

[5 WYOMING, 520.]

**STATUTES—REPEAL—NO SAVING CLAUSE—EFFECT OF.**—It is a general rule that, after a statute is repealed, without a saving clause, the former repealed statute, in regard to its operative effect, is considered as if it had never existed, except as to matters and transactions past and closed.

**STATUTES—REPEAL—NO SAVING CLAUSE—EFFECT OF, AS TO PENDING PROSECUTION.**—If a statute repealing a former act does not contain a substantial re-enactment of the provisions of the old act, so that a suit or prosecution brought under the old statute may be finished under the new act, and such repeal takes place before the final action of the appellate court, pending proceedings in error therein from a judgment of conviction, the prosecution must be dismissed, or the judgment reversed.

**STATUTES—REPEAL—NO SAVING CLAUSE—EFFECT OF, AS TO PENDING PROSECUTION.**—If a statute permitting scabby sheep to be removed from point to point, with the permission of the sheep inspector, or without it, to a dipping corral, with the written consent of all sheep owners along the route, is repealed, without any re-enactment of the provisions of the old statute, and without any clause saving prosecutions under the former act, by a statute which permits no removal of diseased sheep at all, except upon the permission of the sheep inspector, and then only for the purpose of treatment for the disease, a new and distinct offense is created, the old statute is no longer in force, and, if such repeal takes place while a proceeding in error to reverse a judgment of conviction under the former act is pending before the appellate court, the judgment will, on motion, be set aside, and the defendant discharged.

Information for unlawfully removing scabby sheep. The defendant was convicted, and he appealed, by prosecuting a writ of error. Pending the proceedings in error, the statute under which the conviction was had was repealed. A motion was thereupon made to dismiss the proceedings and to discharge the

defendant, on the ground that there was no jurisdiction to take any further steps in the matter. The motion was sustained.

Charles H. Burritt and C. H. Parmelee, for the appellant.

**522** GROESBECK, C. J. The plaintiff in error was convicted in the district court of Johnson county under an information in two counts, one for the unlawful removal of scabby sheep from one place to another in Johnson county, and one for the removal of such diseased sheep from Natrona county to Johnson county. He was fined in the sum of two hundred and fifty dollars, and prosecuted proceedings in error in this court, the petition in error, transcript, and bill of exceptions having been filed in this court November 30, 1894. The statute under which the criminal proceedings were instituted in the court below, chapter 31 of the Laws of 1890-91, was repealed in express terms, without a saving clause, by chapter 125 of the Laws of 1895, which also repealed all acts and parts of acts inconsistent with it, and which took immediate effect upon its approval, March 2, 1895. The plaintiff in error moves for a dismissal of the case and all proceedings thereunder, and for the discharge of the defendant, because the act under which the defendant was convicted was repealed, without keeping in force pending past prosecutions under such repealed statute. This motion was submitted upon the brief of counsel for the plaintiff in error, the attorney general not desiring to file any brief on the part of the state. So far as the case at bar is concerned, the statute under which the defendant below was convicted made unlawful the removal of scabby sheep from one county to another, or from one place to another within any county, without a written certificate of the sheep inspector, except to **523** a dipping corral with the consent of all sheep owners on the route traveled. The punishment provided for a violation of the provisions of the section of the act under consideration was a fine not less than two hundred and fifty dollars nor more than one thousand dollars: Laws 1890-91, c. 31, sec. 8. The repealing statute creates a new law on the subject, and, in relation to the matter of the moving of diseased sheep, provides that the owner of unsound sheep or sheep infected or affected with scab or any infectious or contagious disease shall obtain from the inspector a traveling permit, which shall be granted only for the purpose of moving said sheep to some place where they may be treated for disease; and that "no such sheep shall be moved until such permit shall have been obtained." The penalty provided for

the violation of these provisions is a fine of not less than five hundred dollars nor more than one thousand dollars, and the recovery in a civil action of thrice the amount of damages direct and consequential sustained by any party injured by reason of the moving of the diseased sheep: Laws 1895, c. 125, sec. 15. The statutes are essentially different, the new one permitting no removal of diseased sheep at all, except upon the permission of the sheep inspector, and then only for the purpose of treatment for the disease, and providing a greater minimum penalty than the former act, while the former statute provided that scabby sheep may in effect be removed from place to place in the county or from one county to another, with the permission or "certificate" of the inspector, or without obtaining his certificate, to a dipping corral, with the written consent of all sheep owners along the route. This statute repealing the former one does not, then, contain a substantial re-enactment of the provisions of the old act, so that a suit or prosecution brought under the old statute may be finished under the new act. The new statute does not re-enact the old one either as to the affirmation of the former law in its main provisions defining the offense under consideration, or in the quantum of punishment, but repeals in express terms the former law and every part of it, and enacts, so far as defining an offense is concerned, substantially a new provision, with an enlarged minimum of punishment, <sup>524</sup> and nowhere saves prosecution under the former statutes. The statute in relation to the offense of unlawfully removing diseased sheep from point to point, being a penal statute and relating to the punishment of a misdemeanor defined by its terms, and not to methods of procedure, must be held to act prospectively, and cannot have a retroactive effect, as the punishment is increased by enlarging the minimum of the fine provided from two hundred and fifty dollars to five hundred dollars, and as a new and different offense is created.

The authorities submitted in the brief of counsel for plaintiff in error are numerous and support their contention that the proceedings in error being in fieri, the judgment of the lower court is not to be considered a final judgment, and that this court is bound to consider the cause and pronounce such judgment as is warranted by the statute in force at the time of its judgment, and not under a repealed statute which does not preserve the right by a saving clause to prosecute for past offenses or to continue causes or prosecutions already begun. The general rule is, that after the statute is repealed,



without a saving clause or without an affirmance in substantial terms of enactment of the former law, the former repealed statute, in regard to its operative effect, is considered as if it had never existed, except as to matters and transactions past and closed; and if the statute is repealed before the final action of the appellate court, it will prevent an affirmance of conviction, and the prosecution must be dismissed or the judgment reversed: Sutherland on Statutory Construction, secs. 162, 166; 23 Am. & Eng. Ency. of Law, 502, 514, and cases cited; Yeaton v. United States, 5 Cranch, 281; Hirschburg v. People, 6 Colo. 145; State v. King, 12 La. Ann. 593; Kellar v. State, 12 Md. 322; 71 Am. Dec. 596; Hartung v. People, 22 N. Y. 95. In the case of Kellar v. State, 12 Md. 322, 71 Am. Dec. 596, the court held that where a statute imposing a penalty was repealed after the conviction and appeal, and after an argument on the appeal, but before the final judgment affirming the decision of the trial court, the repealing statute not having been brought to the attention of the court, before the final judgment, that on motion the defendant was entitled <sup>525</sup> to have the entry of affirmance corrected and the judgment reversed. In the opinion, it is said: "The judgment in a criminal cause cannot be considered as final and conclusive to every intent notwithstanding the removal of the record to a superior court. If this were so, there would be no use in taking the appeal or suing out the writ of error." And the language of Chief Justice Marshall in United States v. Schooner Peggy, 1 Cranch, 110, is adopted to the effect that, "if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

Our statute contemplates and provides for the disposal of proceedings in error in this court in criminal causes less than capital, in three modes: To order the discharge of the prisoner, to grant a new trial, or to order the original judgment to be enforced: Rev. Stats., sec. 3356. When the writ of error is allowed, the court or judge allowing the same shall order a suspension of the execution of the sentence until such writ of error shall be heard and determined, and the trial court has no further control over the judgment until the cause is remanded by the appellate court for action: Rev. Stats., sec. 3255. The judgment of the trial court cannot be ordered to be enforced as the statute under authority of which it was rendered has been repealed, without keeping it in force either by

re-enactment of its provisions, or by a saving clause, and is no longer in force; a new trial cannot be ordered under the circumstances, as the cause cannot be tried again under the repealed statute, although the practice has sometimes been in some of the courts to reverse the judgment. It seems that the proper course to do is to set aside the judgment, the practice approved by Chief Justice Marshall in *United States v. Schooner Peggy*, 1 Cranch, 110, and to order the discharge of the plaintiff in error, the defendant below.

The judgment of the district court for Johnson county will be set aside and the defendant John Mahoney, discharged from any further proceedings of that court.

Conaway and Potter, JJ., concur.

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**STATUTES—REPEAL—EFFECT OF, ON PENDING PROSECUTIONS.**—If a statute under which one has been convicted of a criminal offense is repealed, pending an appeal, without qualification or exception, the prosecution must be dismissed: *Sheppard v. State*, 1 Tex. App. 522; 28 Am. Rep. 422. See, also, *Wall v. State*, 18 Tex. 682; 70 Am. Dec. 302; monographic note to *Wharton v. State*, 94 Am. Dec. 217-220, on the effect of the repeal of a criminal statute.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**CALIFORNIA.**

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**ESTATE OF KLEMP.**

[119 CALIFORNIA, 41.]

**EXEMPTION—COMBINED HARVESTER.**—Under a statute exempting farming utensils and implements of husbandry of the judgment debtor, he may hold as exempt a combined harvester costing fifteen hundred dollars, though comparatively few farmers own such a harvester. Under this statute the value of the property claimed as exempt is not material.

White, Hughes & Seymour, for the appellant.

K. S. Mahon and Lawrence Schillig, for the respondent.

**41** **McFARLAND, J.** This is an appeal by an insolvent debtor from an order of the superior court denying his petition to have set apart to his use "one Holt Bros.' Combined Harvester." The court adjudicated that said harvester, and certain other personal property not involved here, "are not utensils or implements of husbandry"; and in so holding we think the court erred.

The court found that at the date of the adjudication in insolvency, and for a long time prior thereto, the appellant had been engaged in the business of farming and grain raising and during all that time had used and employed said harvester in the conduct of his business. The only evidence introduced on the subject of the harvester was the testimony of the appellant himself. He testified that for about nine years he had



been engaged in farming and wheat raising on a certain piece of land in Sutter county; that he had cultivated between ten and eleven hundred acres; that he had used certain personal property including said harvester, in said business; and that "all thereof were and are necessary implements for the proper conducting and care of my said business." He further testified as follows: "I purchased said harvester in the reaping season of 1888, and paid for the same about fifteen hundred dollars, but at this time it is worth about three hundred dollars. I purchased said harvester to be <sup>42</sup> used in harvesting my own crops grown on the leased lands above mentioned, but I have on some occasions, after having harvested my own crops, used said harvester in harvesting the crop or crops of one or two of my neighbors, usually in return for assistance rendered by such neighbor or neighbors in harvesting my own crops. I never have been in the business of harvesting grain, nor have I used said harvester in the business of harvesting grain for others in any manner other than above explained. A combined harvester is a necessary tool for a farmer and grain raiser who is engaged in the business to any considerable extent." He further said that "comparatively few farmers in Sutter county own a combined harvester; some of them still use headers, and some hire combined harvesters to harvest their crops." This testimony was in no way controverted.

Section 690 of the Code of Civil Procedure provides that "the farming utensils or implements of husbandry of the judgment debtor" are exempt from execution. This provision has, on its face, no limitation as to the character of the implements of husbandry so exempt; it does not even provide that they must be "necessary" as is provided in statutes of exemption in many other states, and as is provided in our own code as to other property exempted. Of course, personal property owned by a farmer which is really not an implement of husbandry is not exempt under the section; but if it be such an implement, its exemption does not depend upon its value. There is no limitation as to value, although there is such a limitation as to certain other kinds of property which are exempt under other provisions.

It is clear from the evidence that the combined harvester in question is a farming utensil and an implement of husbandry, if, indeed, that fact is not a matter of common knowledge. It was used directly and prominently in the business of farming, and for no other purpose; and it is not contended that appellant

had other implements by which he could cut, thresh, or winnow his wheat. Horse rakes, gang plows, headers, threshing machines, and combined harvesters are as clearly implements of husbandry as are hand rakes, single plows, sickles, cradles, flails, or an old-fashioned machine for winnowing. There is no ground for excluding an implement from the operation of the statute because it is an improvement, and supplants a former implement <sup>43</sup> used with less effectiveness for the same purpose. Present methods of farming, as well as conducting other kinds of business, require the use of improved machinery.

The fact that not many farmers in Sutter county own combined harvesters is of no importance; it appears that it was not unusual for them to hire such harvesters. The amount of land cultivated by appellant is certainly not unusual in this state. The whole subject is one of legislative policy; and until the legislature shall see fit to limit the implements of husbandry which shall be exempt—either by enumeration, or by a restriction based on value—a court has no warrant in any of the reasons given by respondent to eliminate from the statute anything which is clearly within its terms. No decisions of this court cited by respondent are adverse to the above views. In the case of *In re Baldwin*, 71 Cal. 74, it was held that a threshing machine with an expensive outfit was not exempt because it was used chiefly in doing work for others. The court there say: "It was not intended that all farming machinery which a farmer may own should be exempt because, while he uses it chiefly by renting it out, or in doing work on others' farms for hire, he still uses it to a small extent on his own land. To hold otherwise would enable the farmer who cultivates forty acres to invest a large amount of money in expensive implements, and to hold them free and clear of his creditors, though they were used but for a day on his own land, and for all the balance of the year were rented or hired to others." And in the later case of *In re McManus*, 87 Cal. 292, 22 Am. St. Rep. 250, this court say that in *In re Baldwin*, 71 Cal. 74, it was held that the threshing machine was not exempt "upon the ground that the outfit was principally used in threshing grain raised by other persons for hire." (For a discussion of the general subject see *Montague v. Richardson*, 63 Am. Dec. 173, and notes—it being remembered that our code is broader than any to which our attention has been called, there being no such word used as "necessary," "proper," "adequate," etc.)

We think that the court below erred in refusing to set apart the combined harvester as exempt; and therefore, the order appealed from is reversed.

Temple, J., and Henshaw, J., concurred.

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**EXEMPTION STATUTES—CONSTRUCTION OF—FARMING IMPLEMENTS.**—Exemption statutes should be liberally construed in favor of debtors: *Collier v. Murphy*, 90 Tenn. 300; 25 Am. St. Rep. 698; *Pickrell v. Jerauld*, 1 Ind. App. 10; 50 Am. St. Rep. 192, and note. Under a statute exempting "all household and kitchen furniture," but fixing no limit upon the value of the exemption allowed, a piano kept and used for the purpose of instructing the children of the family may be held as exempt: *Alsop v. Jordan*, 69 Tex. 300; 5 Am. St. Rep. 53.

In the exemption of tools or implements of a debtor's occupation, the distinction between simple instruments and machines of a complicated nature has often been noted in excluding the latter from the benefits of the exemption laws: Extended note to *Kilburn v. Demming*, 21 Am. Dec. 553. Thus a threshing machine requiring eight or ten horses or men to work it is not exempt as a "necessary working tool" of a farmer: Extended note to *Baker v. Willis*, 25 Am. Rep. 66. In these latter cases the statute had limited the value of the exempted articles beyond which the machines in question did not go: Extended note to *Kilburn v. Demming*, 21 Am. Dec. 552.

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## PEOPLE v. HUBERT.

[ 119 CALIFORNIA, 216.]

**INSANITY—INSTRUCTIONS TO THE JURY CONCERNING INSANE DELUSIONS.**—It is not proper to instruct the jury that certain beliefs, which the defendant claims constituted a delusion, impelling him to commit a homicide, were, if entertained by him and unsound, existing only in the imagination, insane delusions as a matter of law. Matters of science are always to be proved; they are treated as matters of fact, and the court should not instruct in regard to them.

**INSANITY—EVIDENCE IN REBUTTAL.**—Though the only evidence offered on behalf of an accused was that he was insane as to certain matters, persons, and things, evidence in rebuttal, given by certain of his intimate acquaintances, that they knew nothing of his insanity is properly received, as, if he had such delusions, it is probable that they would have heard or known of them.

**INSANE DELUSIONS AS AN EXCUSE FOR CRIME.**—If an accused had certain delusions which completely possessed him, but was perfectly sane on other subjects, he must be judged as though the facts with respect to which the delusion existed were real, and, if being real, they would not have constituted any defense, the delusions cannot amount to such defense.

**INSANITY—EVIDENCE, WHAT ADMISSIBLE.**—A witness who had a business acquaintance and conversation with the accused may be permitted to testify that he was sane as a business



man. Upon the question of admitting evidence of this character a very large discretion is usually allowed to the trial court.

**INSANITY.—INSTRUCTIONS** as to justification of homicide on account of an insane delusion are properly refused when there is no evidence tending to prove such delusion.

**INSANE DELUSION AS A JUSTIFICATION OF CRIME.—**An insane irresistible impulse is not a defense to a criminal charge. Though the criminal act is the offspring of an irresistible impulse, and the impulse was irresistible because of mental disease, still defendant must be held responsible if he, at the time, had the requisite knowledge of the nature and quality of the act and its wrongfulness.

**REASONABLE DOUBT.—**To tell the jury that a reasonable doubt is a fair doubt is to give an explanation which does not explain; but such instruction is not prejudicial.

**AN INSTRUCTION TO A JURY** that, after weighing the evidence, they must decide according to their consciences is not prejudicial to the accused. It is only equivalent to telling them to weigh the evidence and decide conscientiously.

F. J. Solinsky and Reddy, Campbell & Metson, for the appellant.

W. F. Fitzgerald, attorney general, and C. N. Post, deputy attorney general, for the respondent.

**218 TEMPLE, J.** The defendant was convicted of murder in the first degree, and appeals from the judgment and from an order refusing a new trial. The defense was insanity of the defendant, caused by excessive indulgence in alcoholic drinks for a number of years, inducing chronic alcoholism, through which his brain became permanently diseased, causing delusions and rendering him incapable of knowing the wrongfulness of the act, for the commission of which he stood charged.

The evidence tended to show that he had been almost constantly drunk for some years, and during the last few months before the homicide had frequently declared that his wife was putting poison in his food, and that the poison caused sores upon his body, and he was in the habit of showing the sores in proof. He also declared that a dog had been poisoned by eating some of the food. He said his wife was a natural born criminal, and that the shape of her head indicated it. He further charged his wife and her brother with stealing eggs and other articles of personal property from his place. He had even attempted to have some food prepared by his wife analyzed, and he made complaint before a magistrate against his wife and her brother, and procured a warrant for their arrest. During all this time he was on very bad terms with his wife and treated her brutally. He wished **219** to obtain a divorce, and tried to

induce her to accept five hundred dollars for her share in the community property. He said she had been guilty of adultery with a person whom he named, and often declared his intention to take her life. On one occasion, he said he would kill her if it took the shirt off his back to clear him.

It seems that he was afflicted with eczema, which caused the breaking out of sores upon his body which he attributed to poison. It was not claimed by anyone that there was any foundation for his cruel charges against his wife. On one side, it was claimed that they were the offspring of malice; on the other, that they constituted an insane delusion which took firm possession of his diseased intellect, and that the homicide was entirely caused by this partial insanity; for the defense also claimed, and counsel induced the court to charge the jury that such was their defense, and counsel here contend as part of the defense that in all other respects and upon all other subjects, except as to the subject matter of the delusions, he was perfectly sane.

The homicide was committed on the nineteenth day of April, 1895. The defendant had a wine cellar, and on that day had employed three of his neighbors to assist him in washing his casks and to rack off his wine. Whether defendant drank any liquor on that day is not shown, expressly or at all, unless from testimony showing that he was nearly always drunk, and that whenever he met acquaintances where there was liquor he insisted upon their drinking with him, we are at liberty to infer that he did not work all the morning in the wine cellar with three acquaintances without drinking. His wife prepared dinner for him and his three assistants, laying out the table in the kitchen. She placed upon the table four plates of soup, and goodnaturedly boasted to the neighbors of its quality. All sat down and commenced eating except the deceased who continued to busy herself about the stove. The defendant tasted his soup three times deliberately, and then without a word got up and went into an adjoining room, from which he immediately returned with a pistol with which he shot his wife through the head. She became at once unconscious and died a few hours later. He said she had put poison in his soup and asked one of the company to taste it. He wanted it preserved for examination. He then ordered <sup>220</sup> them all out of the house, and said he would go for the doctor. When one of them objected to leaving the wife there, he said: "You can't do anything for

her. I have brained her." While they were getting up his horse he walked about distractedly, repeating to himself: "O Lord! What have I done," or some equivalent expression.

He then went to John K. Petty, justice of the peace, and told him he had killed his wife and expected that they would hang him for it. A few days before he had told the same judicial officer that he would have to kill her, and, when told that he would get into trouble, said he didn't care a damn.

He then went to the constable and gave himself up, saying that he had shot his wife, but didn't know if she was dead. He said he took his pistol intending to make her eat some of the soup, and it went off and killed her. Soon after, however, he said he was not sorry, but was glad, and would do the same thing again.

At the trial, at the request of the defendant, the court told the jury that the defense was partial insanity, otherwise called monomania; and that defendant "was laboring under insane delusions which so permeated his reason as to incapacitate him from knowing the difference between right and wrong, as to the acts charged in the information, and his relations with the deceased, and her actions, motives, and intentions toward him, and that he acted in pursuance of such delusions."

The court also, improperly, but at the request of defendant, declared as law certain medical opinions upon the pathology of mental disease. Among them this: "The law recognizes partial as well as total insanity—that a person may be insane upon one or more subjects, and sane as to all others." And again: "A man's mental faculties may be in full vigor, but upon some one subject he seems to be deranged," etc. An instruction was also given enumerating and setting out the special belief which the defense claimed constituted the delusion which impelled the defendant to commit the homicide, and the jury were told that if the defendant entertained such beliefs, and they were unsound, existing only in his imagination, then they were insane delusions, as matter of law. Of course, there is no such rule of law. Matters of science are always to be proven, and are treated as matters <sup>221</sup> of fact, and the court should not instruct in regard to them. The fact that these matters are discussed in legal treatises or judicial opinions does not convert them into propositions of law. In some jurisdictions there is not the same objection to such instructions as here.

The reason for emphasizing the position that counsel for the



defendant only claimed that the defendant was insane as to certain matters, persons, and things, and that he was sane in all other respects, seems to be to furnish a position of advantage from which to attack certain rulings admitting in rebuttal the testimony of acquaintances of the defendant as to his insanity. The objection was, that the evidence did not rebut anything, because defendant did not attempt to prove general insanity, and the witnesses did not pretend to know anything of the alleged delusions. Of course, if no such partial insanity existed, intimate acquaintances could know nothing of it, and the fact that they did not was some proof that defendant had no such delusions. Besides, as a matter of fact, the defense did attempt to prove general insanity, and some of their witnesses testified as to the existence of such insanity.

And, if we admit that partial insanity was shown, this opened the door to the prosecution to show, if it could, that he was in other respects sane. If insanity were shown, the extent of it became at once material, and wherever the burden of showing its limits may have been, it was proper for the prosecution to introduce evidence upon the subject. If the defendant had certain special delusions which completely possessed him, but was perfectly sane on all other subjects, as counsel claim was their position at the trial, then he must be judged as though the facts with respect to which the delusions existed were real: McNaughten's case, 10 Clark & F. 200. I do not find in the record any offer to admit that in other respects the defendant was perfectly sane, and it is at least doubtful if the defense could make such an admission. In this case, such an admission would have been fatal, for there is nothing in the alleged delusions which would constitute a defense.

I think the court ruled correctly in admitting the testimony of C. Burger, but, were it doubtful, we would not, under any ordinary <sup>222</sup> circumstances, reverse a case upon such a point. Upon that subject a very large discretion is necessarily allowed the trial court.

The fourth and fifth instructions were properly refused. There is no evidence tending to establish a delusion as to facts which, if the facts had been as he believed they were, would constitute such jeopardy as would justify the homicide. And, if there had been such evidence, the instruction asked was incorrect. The fifth instruction asked contained propositions in regard to medical science which no court in this state should give.

The sixth instruction asked was properly modified. It should have been refused because an instruction as to the weight and value of evidence, but it also contained a test of responsibility for crime which was incorrect. The correct rule was stated in the modification.

Perhaps the loudest complaint is made over the refusal of the court to give instruction 8. It reads as follows: "When insanity is set up as a defense by a person accused of crime, in order that the defense may avail, the jury ought to believe from the evidence that at the time of the commission of the crime the mind of the accused was so far affected with insanity as to render him incapable of distinguishing between right and wrong in respect to the killing, or, if he was conscious of the act he was doing and knew its consequences, that he was in consequence of his insanity wrought up to a frenzy which rendered him unable to control his actions or direct his movements; but, where the insanity consists of an insane delusion, the very fact that he is possessed of such a delusion shows that he is incapable of reasoning upon that subject; otherwise it would not be an insane delusion; and if, in pursuance and as a part of said insane delusion he should commit some overt act, or what would otherwise be a criminal act, then, as a matter of law, you are instructed that he is unable to reason upon the nature or quality of the act, or to know or understand the wrongfulness of the act."

The ruling is entirely justified by the fact that the proposed instruction is partly upon the weight and value of evidence, but it contains the proposition that an insane, irresistible impulse is a defense to a criminal charge. If this be not a defense, then <sup>223</sup> there was no attempt to make a defense at the trial. The very statement of the defense, if it would be regarded as an admission of the facts, necessitated a conviction.

This involves also another point, made, to wit, that the verdict is against the evidence, in which it is contended there is no substantial conflict.

It must be held that, conceding that the act was the offspring of an irresistible impulse, and the impulse was irresistible because of mental disease, still the defendant must be held responsible if he at the time had the requisite knowledge as to the nature and quality of the act, and of its wrongfulness. It was so held in *People v. Hoin*, 62 Cal. 120, 45 Am. Rep. 651, and in *People v. Ward*, 105 Cal. 335.

We do not know that the impulse was irresistible, but only

that it was not resisted. Whether irresistible or not must depend upon the relative force of the impulse and the restraining force, and it has been well said to grant immunity from punishment to one who retains sufficient intelligence to understand the consequences to him of a violation of the law may be to make an impulse irresistible which before was not.

It has been proposed as a rule to leave it to the jury to say whether the act was the offspring of insanity, meaning, I presume, whether the defendant would have committed the act had he not been insane.

There are many degrees in mental unsoundness. Some cases could only be detected by a very skilled expert. Some cases of mental unsoundness might be known only to very intimate acquaintances, and perhaps by them only noticeable under peculiar conditions. But, however slight the defect, only Omniscience can say whether the act would have been committed had the taint not existed. It is an impracticable rule.

It is said the impulse is irresistible, because by the impairment of the emotional part of the intellect the will power is destroyed or weakened. No one contends that the legal test is perfect; doubtless it is far from being so; but when the will power is weakened, although the mentality is not at all or only slightly impaired, the fear of punishment must be of some value as a restraint, and the class of people referred to need that restraining influence most. Lord Bromwell, in a discussion of this subject, <sup>224</sup> related the case in which a witness, to prove that a prisoner was so afflicted, related that he had once become violent and killed a cat, and said he believed the impulse could not be resisted by the defendant. His lordship asked if he thought he would have killed the cat if a policeman had been present. The witness answered no. His lordship then said he supposed the impulse was irresistible only in the absence of a policeman.

There are doubtless some cases, like that of Hadfield's case, 27 How. St. Tr. 1281, in which the fear of punishment does not restrain, but, where the rule works manifest injustice, the unfortunate defendant is in some way saved from punishment.

In *United States v. Guiteau*, 1 Mackey, 498, 47 Am. Rep. 247, to show whether the act charged was the offspring of mental disease or of natural passion, the prosecution was allowed to show that the accused had always been malicious and brutal. In other words, to show any other delinquency of which he had been guilty which would tend to show that he was bad enough



to commit an act so atrocious from natural passion. I think our rule more humane, more worthy of a civilized people.

The refusal of the court to instruct the jury that it must be presumed in favor of innocence that Mrs. Hubert did not attempt to poison defendant could have done no harm. It was evidently—as already said—taken for granted by everyone that the charge was false, and, besides, the delusion, if it existed, did not constitute a defense under the admitted facts of this case.

To tell the jury that a reasonable doubt is a fair doubt is to give an explanation that does not explain. It seems to me the first phrase is the one most easily comprehended, but the jury could not conclude that it was taken back by the meaningless phrase. The criticism upon the use of the word “testimony” is answered by *Mann v. Higgins*, 83 Cal. 69.

There was nothing wrong in telling the jury that after weighing the evidence they must decide according to their consciences. Of course, they must consider the evidence by the use of their reasons, and, if we consider the conscience a distinct faculty, they could not weigh the evidence in their consciences, but they could weigh the evidence and decide conscientiously, and that is what they were told to do.

Several other points are made which I do not think it worth <sup>225</sup> while to discuss. They have been carefully considered, and I do not think they call for a reversal.

In view of what has been said, it is unnecessary to consider further the point that the verdict is against the evidence. In addition to what has been suggested, there was evidence which would have justified the jury in concluding that the defendant was not at all insane, and, even if he were partially insane, yet the criminal act was not the offspring of such insanity, but of the natural passions of the defendant.

The judgment and order are affirmed.

Henshaw, J., McFarland, J., Harrison, J., Garoutte, J., Van Fleet, J., and Beatty, C. J., concurred.

Rehearing denied.

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**HOMICIDE—INSANITY AS DEFENSE—IRRESISTIBLE IMPULSE.**—Insanity is not available as a defense to an indictment for murder if the accused, at the time of the killing, was capable of distinguishing between right and wrong with respect to that act, and was conscious that the act was one which he ought not to have done, although he might have been impelled by an irresistible impulse to do it: *Genz v. State*, 59 N. J. L. 488; 59 Am. St. Rep. 619, and note. An irresistible impulse to kill cannot be set up as

a defense to murder, so long as the accused knew that the act he was committing was a crime morally, and punishable: *State v. Alexander*, 30 S. C. 74; 14 Am. St. Rep. 879. See, also, note to *Genz v. State*, 59 Am. St. Rep. 625.

**HOMICIDE — INSTRUCTIONS — INSANITY.** — Without evidence suggesting a doubt of the sanity of a person on trial for murder, except the enormity of the crime, the court need not instruct the jury as to his sanity: *Singleton v. State*, 71 Miss. 782; 42 Am. St. Rep. 488. Every man is presumed to be sane until the contrary be shown: *Carter v. State*, 12 Tex. 500; 62 Am. Dec. 539.

**HOMICIDE — INSTRUCTIONS — REASONABLE DOUBT.** — No set formula is required in defining reasonable doubt. But to instruct the jury that "a reasonable doubt is such a doubt as fairly and naturally arises in the minds of the whole jury" is liable to mislead them, and it is, therefore, erroneous: Monographic note to *Burt v. State*, 48 Am. St. Rep. 572, 573, on definitions of reasonable doubt.

#### Of Insane Delusions.

Though long doubted, it is now well settled, both in England and in these United States, that the same person may be at the same moment both sane and insane, or, more accurately speaking, insane upon one or more subjects and sane upon all others, and in what he does with reference to the former will be treated both by the courts administering the criminal laws and by those administering the civil as insane, while in respect to the latter he will be held responsible in the criminal courts for crimes committed by him, and in the civil courts his contracts and dispositions of property will be adjudged binding and valid. At a very recent period some of the judges in England still insisted that, at least in so far as testamentary capacity was involved, a testator must be deemed wholly sane or wholly insane, and hence that if he were shown to be subject to insane delusions, his will must be refused probate, though not proved to have resulted from or to have been influenced by them. Thus so late as the year 1867 Lord Penzance, in the course of his opinion in *Smith v. Tebbitt*, L. R. 1 Pro. & D. 398, said: "A person who is affected by monomania, although sensible or prudent on subjects and occasions other than those upon which his infirmity is commonly displayed, is not in law capable of making a will. This has been clearly decided in several cases quoted at bar, of which it is only necessary to name that of *Waring v. Waring*, 6 Moore P. C. C. 341. It is needless to travel over paths by which this conclusion has been reached. It is properly the starting point in such an inquiry as the present. For I conceive the decided cases to have established this proposition: That, if disease be once shown to exist in the mind of the testator, it matters not that the disease be discoverable only when the mind is addressed to a certain subject, to the exclusion of all others, the testator must be pronounced incapable. Further, that the same result follows, though the particular subjects upon which the disease is manifested have no connection whatever with the testamentary disposition before the court." It would be difficult to discover a more clear and explicit misstatement of the law upon the subject. The language is quoted, not as an authority, but as a legal curiosity to provoke our wonder

that it could have been employed by an eminent judge in the latter half of the present century.

*What is an Insane Delusion is a Question of Law.*—We purpose to treat in this note the subject of insane delusions to the extent of showing what they are, and what is their effect upon the responsibility of the person possessed by them for acts otherwise criminal, and how far they render void or nonenforceable contracts entered into by him, or dispositions attempted to be made by him of his property, testamentary or otherwise. "What constitutes insane delusion and its effect upon testamentary capacity are questions of law. Whether or not a testator come within the definition is a question of fact to be found by the jury from the evidence. If, in the view of the court, there shall be no facts in evidence bringing the testator within the embrace of the court's definition or explanation of such a state, the issue should be taken from the jury": *Prather v. McClelland*, 76 Tex. 587; *Appeal of Kimberly*, 68 Conn. 435; 57 Am. St. Rep. 101; *Hale v. Hills*, 8 Conn. 39.

*Definitions.*—Many judicial definitions of insane delusion have been given, either by trial courts in instructing juries, or by appellate tribunals in reviewing instructions so given or other action taken by the subordinate courts. Many of these definitions are imperfect, and some of them misleading. Their great number and variety sufficiently attest the intrinsic difficulty of formulating any satisfactory definition of the subject. We shall first quote a large number of these definitions and subsequently point out the respects in which in our judgment some of them are inadequate or misleading. "A delusion is a belief in a state or condition of things, the existence of which no rational person would believe": *Matter of Mason*, 60 Hun, 51; *Matter of Forman's Will*, 54 Barb. 289; *Schneider v. Manning*, 121 Ill. 376. "A delusion of the mind which renders void the act caused by such delusion must be a belief of facts which no sane person would believe": *Riggs v. American Home Soc.*, 35 Hun, 658. "Delusion is that which springs spontaneously into the mind in absolute independence of the processes of reason": *Smith v. Smith*, 48 N. J. Eq. 587. Delusion is "a pertinacious adherence to some idea in opposition to plain evidence or its falsity": *Smith v. Tebbets*, L. R. 1 Pro. & D. 402. "Insane delusions are of two kinds: Belief in things impossible; the belief in things possible, but so improbable, under the surrounding circumstances, that no man of sound mind would give them credit—to which we may add the carrying to an insane extreme impulses not in their nature irrational": *Princep v. Dyce Sombre*, 10 Moore P. C. C. 247. "A delusion is the mind's spontaneous conception or acceptance of that, as a fact, which has no real existence except in its imagination, and its persistent adherence to it against all evidence": *Smith v. Smith*, 48 N. J. Eq. 570. "It is of the essence of an insane delusion, that as it has no basis in reason, so it cannot by reason be dispersed, and it is thus capable of being cherished side by side with other ideas with which it is rationally inconsistent. An insane delusion is not only one which is founded in error but one in favor of the truth of which there is no evidence, but the clearest often to the contrary. It must be a delusion of such a character that no



evidence or argument will have the slightest effect to remove": *Merrill v. Ralston*, 5 Redf. 251. "Delusions are conceptions that originate spontaneously in the mind without evidence of any kind to support them, and can be accounted for on no reasonable hypothesis. The mind that is so disordered imagines something to exist or imputes the existence of an offense which no rational person would believe to exist or to have been committed without some kind of evidence to support it. They are baseless as the fabric of a dream conjured into existence by a disordered or perverted imagination without any sort of foundation in fact": *Potter v. Jones*, 20 Or. 249. "If a person persistently believes supposed facts which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion, and delusion in that sense is insanity. Such a person is essentially mad or insane on those subjects, though on other subjects he may reason, act, and speak like a sensible man": *American Seamen Soc. v. Hopper*, 33 N. Y. 624. "An insane delusion is one which not only is founded on error, but is without evidence of its truth, and often exists against the clearest evidence to the contrary. Its essence is that it has no basis in reason, and cannot be dispelled thereby": *Merrill v. Ralston*, 5 Redf. 220; *Potter v. McAlpine*, 3 Dem. 122. "Monomaniacs are those persons who are insane upon some one or more subjects, whether it relate to one or more persons or things, and apparently sane upon all others. Such persons are competent to make a will, unless the subject of their infirmity is involved in the making of it": *Colhoun v. Jones*, 2 Redf. 37. "Monomania is insanity upon a single subject. It is an insane delusion which renders the person afflicted incapable of reasoning on that particular subject; he assumes to believe that to be true which has no foundation or reason in fact on which to found his belief. A person persistently believing supposed facts which have no real existence against all evidence and probability, and conducting himself upon an assumption of their existence, is, so far as such facts are concerned, under an insane delusion": *Haines v. Hayden*, 95 Mich. 332, 354; 35 Am. St. Rep. 566. "An insane delusion is a false belief for which there is no reasonable foundation, and which would be incredible under the given circumstances to the same person if of sound mind, and concerning which the mind of the decedent was not open to permanent correction through evidence or argument": *Appeal of Kimberly*, 68 Conn. 437; 57 Am. St. Rep. 101. "The persistent belief of a person in supposed facts, which really have no existence, except in his imagination, and his acting upon such belief, proves him, so far as such acts are concerned, to be acting under a morbid delusion. Such a delusion is partial insanity. Whenever it appears that the will is the direct offspring of such partial insanity, it must be regarded as invalid, though the general capacity of the testator is unimpeached": *Colhoun v. Jones*, 2 Redf. 37. "Wherever the patient once conceives something extravagant to exist, which has, still, no existence whatever but in his own heated imagination, and wherever, at the same time, having so conceived,

he is incapable of being, or at least, of being permanently, reasoned out of that conception, such patient is said to be under a delusion. On the contrary, in the absence of any such delusion, with whatever extravagances a supposed lunatic may be justly chargeable, and how likesoever to a real madman he may either speak or act, on some, or on all, subjects, still, in the absence of anything in the nature of delusion, so understood as above, the supposed lunatic is not properly or essentially insane": Dew v. Clarke, 3 Add. Ecc. 79, 90; 2 Ecc. Rep. 436; Mullins v. Cottrell, 41 Miss. 313; Benoist v. Murrin, 58 Mo. 307; Stanton v. Wetherwax, 16 Barb. 262. "It is only a delusion or conception which springs up spontaneously in the mind of the testator, and is not the result of extrinsic evidence of any kind that may be regarded as furnishing evidence that his mind is diseased or unsound; in other words, that he is subject to insane delusions. If, without evidence of any kind, he imagines or conceives something to exist which does not in fact exist, and which no rational person would, in the absence of evidence believe to exist, then it is manifest that the only way in which his irrational belief can be accounted for is that it is the product of mental disorder": Middleditch v. Williams, 45 N. J. Eq. 734; Potter v. Jones, 20 Or. 248. "Hallucination is a morbid error in one or more of the senses; a perception of objects which do not, in fact, make any impression on the external senses": Staples v. Wellington, 58 Me. 454. An insane delusion "is where a person believes something to exist which not only does not exist, but of which he has no evidence sufficient to satisfy any healthy mind, and he acts upon it, reasons upon it, and holds it as a reality. That may be an insane delusion; that is to say, where it is so palpable that he believes it without reason; any reason sufficient to satisfy a healthy mind; and he acts upon it when it cannot possibly be true; that is an insane delusion": Robinson v. Adams, 62 Me. 402; 16 Am. Rep. 473. "If, without evidence of any kind, he imagines or conceives something to exist which does not in fact exist, and which no rational person would, in the absence of evidence believe to exist, then it is manifest that the only way in which his irrational belief can be accounted for, is that it is the product of mental disorder. Delusions of this character can be accounted for upon no reasonable theory except that they are the creations of some derangement of the mind in which they originate": Middleditch v. Williams, 45 N. J. Eq. 734. In his charge to the jury in Boughton v. Knight, L. R. 3 Pro. & D. 68, Sir James Hannen said: "What is a delusion? On this subject an eminent judge who formerly presided in the court, the jurisdiction of which is now exercised here, Sir J. Nicholl, in the famous case of Dew v. Clarke, 3 Add. Ecc. 79, says: 'One of the counsel (Dr. Lushington) accurately expressed it; it is only the belief of facts which no rational person would have believed that is insane delusion.' Gentlemen, in one sense that is arguing in a circle, for, in fact, it is only saying that a man is not rational who believes what no rational man would believe; but for practical purposes it is a sufficient definition of a delusion, for this reason: That you must remember that the tribunal that is to determine the question (whether judge

or jury), must, of necessity, take his own mind as the standard whereby to measure the degree of intellect possessed by another man. You must not arbitrarily take your own mind as the measure, in this sense, that you should say, I do not believe such and such a thing, and therefore the man who does believe it is insane. Nay, more; you must not say, I should not have believed such and such a thing, therefore the man who did believe it is insane. But you must of necessity put to yourself this question, and answer it, Can I understand how any man in possession of his senses could have believed such and such a thing? And if the answer you give is, I cannot understand it, then it is of the necessity of the case that you should say, the man is not sane." The test thus quoted was apparently approved in *Phillips v. Chater*, 1 Dem. 533, 542; *Guiteau's case*, 10 Fed. Rep. 170; *State v. Lewis*, 20 Nev. 359.

An insane delusion, "according to all testimony, seems to be an unreasoning and incorrigible belief in the existence of facts which are either impossible absolutely, or, at least, impossible under the circumstances of the individual. In most cases the fact believed is something affecting the senses. It may also concern the relation of the party with others. But generally the delusion centers around himself, his cares, his sufferings, rights, and wrongs. It comes and goes independently of the exercise of the will and reason. Like the phantasms of dreams, it is, in fact, the waking dream of the insane, in which facts present themselves to the mind as real, just as objects do to the distempered vision of delirium tremens. The important thing is that an insane delusion is never the result of reasoning and reflection. It is not generated by them, and it cannot be dispelled by them. A man may reason himself, and be reasoned by others, into absurd opinions, and may be persuaded into impracticable schemes and vicious resolutions, but he cannot be reasoned or persuaded into insanity or insane delusions. When convictions are founded on evidence, on comparison of facts and opinions and arguments, they are not insane delusions. The insane delusion does not relate to mere sentiments or theories on abstract questions of law, politics, or religion. All these are subjects of opinions; which are themselves founded on reasoning and reflection. These opinions are often absurd in the extreme. Men believe in animal magnetism, spiritualism, and like matters, to a degree that seems unreason itself to some people. And there is no absurdity in relation to religion, politics, and social questions that has not its sincere supporters. These opinions result from naturally weak or ill-trained reasoning powers, hasty conclusions, or insufficient data, ignorance of men and things, credulous dispositions, fraudulent impostures, and often from perverted moral sentiments. But still, they are opinions, founded upon some kind of evidence, and liable to be exchanged by better external evidence or sounder reasoning. But they are not insane delusions": *Guiteau's case*, 10 Fed. Rep. 170; *State v. Lewis*, 20 Nev. 359.

To define an insane delusion as a belief in a state or condition of things, in the existence of which no rational person would believe may not be incorrect, but it is undoubtedly but little more satisfactory than to declare that a delusion is a delusion. It omits



all test for determining what persons are rational, and apparently ignores the undoubted fact that persons equally rational have varied capacities for belief and for the weighing of evidence, and that some of them will implicitly accept as true what others will with equal confidence reject as unworthy of belief. In truth, in undertaking to decide what a rational person would believe or do, I must necessarily refer the question to my own mind which may happen to be less, rather than more, rational than the mind whose rationality I seek to determine. This criticism is equally applicable to those definitions which declare that a delusion is a belief of facts which no sane person would believe. Nor are we satisfied, as some of the definitions state, that a delusion is necessarily absolutely independent of the processes of reason. On the contrary, we believe that an insane delusion may be, and often is, the result of the application of the processes of reason, and often of logical reasoning, to premises founded in delusion. That a delusion is persistently adhered to against all evidence manifestly shows that it is fixed, but is not necessarily an element of the delusion itself; for we apprehend that if a person entertained an insane delusion but for a moment, during which he did some act dominated by its influence, and immediately afterward the delusion disappeared, the act must nevertheless be judged by the same rules as if the delusion had long antedated it, and had continued long afterward in defiance of all evidence and argument.

As suggested by Sir James Hannen in the quotation made by us from his instruction to the jury in *Boughton v. Knight*, L. R. 3 Pro. & D. 68, such inadequacy and error as may be found in the definitions given of insane delusion have not been of much practical importance, for the reason that both judges and jurors must necessarily be left to determine from their own minds and beliefs what beliefs on the part of others are so irrational or unreasonable that they may properly be treated as insane delusions. Of course, if a belief be conceded to be true it cannot be denounced as a delusion. But, on the other hand, is it necessary that it be conceded or demonstrated to be untrue before it can be characterized as a delusion? There are many beliefs which cannot be proved to be either true or false. With respect to them the question arises, Can they be treated as delusions because they are not shared by the great mass of mankind, and to all persons other than the believers seem to be improbable and irrational? The judges have generally evaded the question by holding that a will executed, or a transaction entered into, through the dominating influence of such a belief is not the will or transaction of the party, but is infected by an undue influence. But if the belief is true its influence is not necessarily nor ordinarily undue. To illustrate: If it were proved that a testator believed that an angel appeared to him and told him to make a particular disposition of his property, and that only by so doing could he escape pain, and secure happiness after death, and that thereupon the testator made his will as suggested by the angel, disinheriting his heir at law, whom he regarded with affection, it would be impossible to demonstrate that no angel ever appeared to him, or attempted to control his testament, and yet the

will would not be permitted to stand. So, though he had no belief in any communication between himself and any supernatural person, yet, if he had an abiding conviction that after death he should become a dog, and on that account he disinherited his heir for the purpose of founding an asylum for homeless and maltreated dogs, the will would again be set aside, though it could not be proved that his belief was untrue, nor, if true, that his action was irrational, unnatural, or the result of undue influence. For, if his belief were true, the propriety of his seeking to promote his welfare after death was as obvious as that of his providing food and shelter for himself in life. Though the courts may profess, in both cases, to proceed on the ground of undue influence, yet the real ground is that the testator was unduly influenced by a false belief, a delusion respecting his future state. Concede his belief to be true, his will should be sustained. In our judgment, therefore, the first essential element of an insane delusion is that it is a belief in a state of facts which can be demonstrated to be untrue, or which appear to those whose duty it becomes to decide the question to be so improbable that acts done because of the belief must be treated as though done under a conceded or established delusion. Falseness is not the only, and is perhaps not the chief, element of an insane delusion, for sane men constantly act upon beliefs, the falseness or incorrectness of which upon due consideration can be indisputably demonstrated. An insane belief must have been acquired in a manner in which sane beliefs are not acquired. The false beliefs of the sane are acquired by acting upon false or insufficient evidence, or by drawing an illogical conclusion from evidence, whether true or false, or by accepting as true, without either inquiry or reasoning, beliefs which they find existing in the community of which they are a part, or which they receive consciously or unconsciously from their near relatives and other associates. An insane delusion is not due to any of these causes. It is attributable to a diseased, or at least to an unnatural, mind or body acting as a natural and healthy mind or body cannot act, which hears where there is no sound, or sees where there is naught to be seen, or whose memory, by some capricious action, has departed from its mission of faithful historian, and has so intermingled in its archives, facts and imaginings that the one can no longer be distinguished from the other, or that perhaps the latter only remain to control future action. Therefore, we should define an insane delusion to be a false belief due to a diseased or disordered mind, and which the same mind before the period of its disease or disorder would not have believed under the same circumstances.

That an act or a belief is unreasonable or illogical is by no means conclusive of an insane delusion existing in the mind of the actor or believer. In every instance in which a false belief has been entertained, and it is hence claimed that an insane delusion has existed, it is proper to show the circumstances under which the belief came into being. If they justified the belief, there could have been no delusion in contemplation of the law. If, on the other hand, they excluded all foundation for it, their force in supporting the claim of delusion would often become irresistible: *Floreys v.*

Florey, 24 Ala. 241; Shorb v. Brubaker, 94 Ind. 165; Hite v. Sims, 94 Ind. 333. They may, however, neither show that the belief was true nor that it was without any foundation, but may disclose various facts which the mind in question considered and from which it drew conclusions, and these, however illogical, or inadequately supported, can rarely or never be deemed insane delusions. Before anyone can be held to have an insane delusion because of his entertaining a belief, it is necessary to examine the grounds of his belief, not ordinarily for the purpose of ascertaining whether it was well founded, but to determine whether they were such that therefrom, rather than from a disordered mind, the belief or suspicion in question may have arisen: Mullins v. Cottrell, 41 Miss. 317; Foster v. Dickerson, 64 Vt. 233; In re White, 121 N. Y. 406; Matter of Forman's Will, 54 Barb. 289; Cole's Will, 49 Wis. 179; In re Cline's Will, 24 Or. 175; 41 Am. St. Rep. 851; Stackhouse v. Horton, 15 N. J. Eq. 202, 228; Middleditch v. Williams, 45 N. J. Eq. 734. If that which is claimed to have been a delusion could have been true, its falseness must not be presumed, and he who claims that it was a delusion must assume the burden of proving that it did not happen: Jenckes v. Court of Probate, 2 R. I. 255. Nor is proof of this fact sufficient if it might readily have happened, and the circumstances were such that from them a belief or suspicion that it happened might have been engendered in a sane, though illogical or suspicious, mind. Hence if it is claimed that a wife had an insane delusion respecting the conduct of her husband with other women, evidence is admissible to show what his conduct and reputation in this respect were: Foster v. Dickerson, 64 Vt. 233; Matter of Forman's Will, 54 Barb. 289. So if a child has been disinherited by its father, and the claim is that his action was due to a delusion respecting its illegitimacy, the claim cannot be sustained if it appears that circumstances were disclosed to him from which his belief or suspicion arose tending in some degree to support it, though inconclusive in character, and not sufficient to have created the same belief or suspicion in the mind of another: Potter v. Jones, 20 Or. 239; In re Cline's Will, 24 Or. 175; 41 Am. St. Rep. 851; Clapp v. Fullerton, 34 N. Y. 190; 90 Am. Dec. 681. Whatsoever be the nature of the supposed delusion, if there was any foundation for it, and it rests on such foundation, it may be a mistake, or an erroneous conclusion, but it is not a delusion: Stackhouse v. Horton, 15 N. J. Eq. 202, 228; State v. Lewis, 20 Nev. 360; Middleditch v. Williams, 45 N. J. Eq. 734. "If there are facts, however insufficient they may in reality be, from which a prejudiced, or a narrow, or a bigoted mind might derive a particular idea or belief, it cannot be said that the mind is diseased in that respect. The belief may be illogical or preposterous, but it is not, therefore, evidence of insanity in the person. Persons do not always reason logically, or correctly, from facts, and that may be because of their prejudices, or of the perversity, or peculiar construction of their minds. Wills, however, do not depend for their validity upon the testator's ability to reason logically, or upon his freedom from prejudices": In re White, 121 N. Y. 406. Hence, if a testator believes that his heirs



have not treated him rightly, or that his children have been disobedient, or a wife that her husband has been unkind or untrue, and, under the influence of such belief, makes a will, it cannot be avoided as for an insane delusion if, in forming the belief or suspicion, the testator or testatrix drew conclusions from real facts and circumstances, though, in the opinion of the judge or jury, the conclusions had little, or no, support in the facts and circumstances from which they were thus drawn: *Matter of Forman's Will*, 54 Barb. 289; *Mullins v. Cottrell*, 41 Miss. 317; *Shorb v. Brubaker*, 94 Ind. 165; *Hite v. Sims*, 94 Ind. 333; *Estate of Carpenter*, 94 Cal. 406. The making of a will by one spouse, excluding the other from participation in the testator's estate, is often due to jealousy or a suspicion of unfaithfulness to the marital obligation, and, when such is the case, the suspicion is generally claimed to have been founded in a delusion. It is rarely possible, after the death of the spouse thus entertaining the suspicion against the other, to prove on what ground it rested, and the courts are apparently very averse to treating it as an insane delusion. Thus in *Cole's Will*, 49 Wis. 179, the court said: "It must be conceded that the belief of deceased in respect to the unchastity of his wife, persisted in, as it was, without evidence to support it, and against all reasonable probabilities of its truth, looks very much like insane delusion. Yet it is not necessarily so. Observation teaches us that there is a very large class of people, whose sanity is undoubted, who are unduly jealous or suspicious of others, and especially of those closely connected with them, and who, upon the most trivial, even whimsical grounds, will wrongfully impute the worst motives and conduct to those in whom they ought to confide. This insanity, which is developed in a great variety of forms, is altogether too common, and too many persons, confessedly sane, are to a greater or less extent afflicted with it, to justify us in saying that because the deceased was so afflicted he was insane, or the victim of insane delusion. The line between the unfounded and unreasonable suspicions of a sane mind (for doubtless there are such) and insane delusion, is sometimes quite indistinct and difficult to be defined. However, the legal presumption is in favor of sanity, and on the issue of sanity or insanity the burden is upon him who asserts insanity to prove it. Hence, in a doubtful case, unless there appears a preponderance of proof of mental unsoundness, the issue should be found the other way."

Notwithstanding what has been said in the courts to the effect that an erroneous conclusion, drawn from existing evidence brought to the attention of the testator, cannot be regarded as a delusion, there are some cases not wholly reconcilable with this view. Thus where it was shown that the principal legatee was born some years after the testator's marriage to his mother, but that he, nevertheless, bore the peculiar distinctive marks of the negro race, while his mother and the testator were white persons of fair complexion, the latter's continued belief, notwithstanding these marks, that the legatee was his son, was deemed sufficient evidence of an insane delusion: *Florey v. Florey*, 24 Ala. 241. This decision, however, is perhaps more attributable to a preju-

dice in the mind of the court against all persons bearing the distinctive marks in question than to any intention on its part to deny the existence and reasonableness of the well-established rule, that an incorrect conclusion drawn from evidence is not to be treated as an insane delusion.

A will made under the influence of a mistake or a misapprehension of facts may not represent what would have been the testator's disposition of his property had the mistake not existed. Whether, under any circumstances, such a mistake is available to persons disinherited through its influence is a question not appropriate for consideration here. It is sufficient for the purposes of our present inquiry to state that a mistake or misapprehension of this character is not an insane delusion: *Mosser v. Mosser*, 32 Ala. 551; *Brace v. Black*, 125 Ill. 33; *Martin v. Thayer*, 37 W. Va. 38.

*Prejudices—Eccentricities.*—Sane persons often entertain violent and unreasonable prejudices, sometimes extending to, and resulting in, the disinheritance of their heirs at law. There is, however, a wide distinction between prejudice and insane delusion, though the former is sometimes the result of the latter. Though a will is probably, or manifestly, the result of a prejudice on the part of the testator which all other persons, under the existing circumstances, so far as disclosed to them, must deem unreasonable, it cannot, on that ground, be avoided as the product of an insane delusion, for perhaps the majority of wills result either from a bias in favor of their beneficiaries, or a prejudice against heirs at law not susceptible of being accounted for by the rules of logic. Hence the general statement, nowhere, so far as we are aware, dissented from, that neither eccentricity nor prejudice, nor both together, can be regarded as an insane delusion: *Carter v. Dixon*, 69 Ga. 82; *Schneider v. Manning*, 121 Ill. 376; *Sherley v. Sherley*, 81 Ky. 240; *Stackhouse v. Horton*, 15 N. J. Eq. 202, 228; *Coit v. Patcher*, 77 N. Y. 533; *Boughton v. Knight*, L. R. 3 Pro. & D. 64. We have already suggested, however, that a prejudice may be the result of an insane delusion, and there are, doubtless, instances in which its existence is so unreasonable as to warrant a judge or jury in attributing it to such a delusion: *Thomas v. Carter*, 170 Pa. St. 272; 50 Am. St. Rep. 770. Hence, where a jury was instructed to disregard all evidence in reference to ill-will, prejudice, or hatred entertained by the testator toward one of his relatives, it was held that such instruction was erroneous and prejudicial, the court saying: "While ill-will, prejudice, hatred, or the exhibition of violent passion by a person usually good natured and affable do not of themselves constitute insanity, they may, and often are, manifestations of mental derangement; and evidence of their existence with reference to persons so nearly related as to be naturally entitled to his bounty against whom he entertained suspicions which might affect the disposition of his property, should be left to the jury to determine whether they result from naturally ungovernable passions, or were produced by provocation, or were the indication or sign of a decaying or decayed mind"; *Sherley v. Sherley*, 81 Ky. 240. Thus, speaking of the question whether a prejudice or harsh feeling entertained by a parent

toward his children might not be evidence of insanity, Sir James Hannen said: "It is unfortunately not a thing unknown that parents (in justice to women, I am bound to say it is more frequently the case with fathers than with mothers), that they take unduly harsh views of the characters of their children, sons especially. That is not unknown. But there is a limit beyond which one feels that it ceases to be a question of harsh, unreasonable judgment of character, and that the repulsion which a parent exhibits toward one or more of his children must proceed from some mental defect in himself. It is so contrary to the whole current of human nature that a man should not only form a harsh judgment of his children, but that he should put that into practice, so as to do them injury or deprive them of advantages which most men desire to confer upon their children. I say there is a point at which such repulsion and aversion are of themselves evidence of unsoundness of mind. Fortunately, the case is rare. It is almost unexampled that a delusion consisting of aversion to children is manifested without other signs which may be relied upon to assist one in forming an opinion on that point": *Boughton v. Knight*, L. R. 3 Pro. & D. 64, 69. In the case of *Dew v. Clarke*, 1 Add. Ecc. 279, for the purpose of avoiding a will disinheriting testator's daughter, she pleaded that immediately after her birth he showed great antipathy, refusing to see her for two or three years, that he labored under great and continuous delusion of mind respecting her, declaring that she was invested by nature with singular depravity, and was the special property of Satan, and that, as she advanced in life, he continued to entertain similar notions respecting her until the time of his death. The question being presented whether the plea thus sought to be interposed could be entertained, the judge determined this question in the affirmative, adding that it was not likely that the proof would come up to the pleading, and even if it did, he did not pledge himself to pronounce against the will, and that he gave the daughter notice that the burden of proof rested with her, and that, "she must understand that no course of harsh treatment, no sudden bursts of violence, no display of unkind or even unnatural feeling merely, can avail in proof of her allegation; she can only prove it by making out a case of antipathy clearly resolvable into mental derangement, and plainly evincing that the deceased was insane as to her, notwithstanding his general sanity." Notwithstanding the opinion thus expressed that the evidence would probably not sustain the plea, the prophecy of the learned judge was not verified. The evidence as disclosed at the trial, was of a remarkable character, and amply proved the daughter to have been of a sweet and kindly disposition, to have entertained and evinced more filial devotion than could have been anticipated under the circumstances, and that the feeling and conduct of her father toward her during her entire life, showed such unfounded aversion and such aggravated unkindness that they could be attributed to none other than insane delusions, and hence the will was pronounced null and void, and the father to have died intestate in law: *Dew v. Clarke*, 3 Add. Ecc. 79.

*Moral Insanity.*—Prejudices and aversions may amount to moral



insanity, which has been described as "consisting of a morbid perversion of the feelings, affections, and active powers without any allusion to erroneous conviction impressed upon the understanding." It may, of course, be associated with, or result from, delusion or from total insanity, but, standing alone, it is not deemed a delusion, nor sufficient to avoid a testamentary disposition attributable to its influence: *In re Forman's Will*, 54 Barb. 201; *Boardman v. Woodman*, 47 N. H. 120; *Mayo v. Jones*, 78 N. C. 402; *Frere v. Peacock*, 1 Rob. Ecc. 442.

*Spiritualism and Other Beliefs in the Supernatural.*—As heretofore suggested, there are many beliefs which it is impossible to prove either to be true or false, and hence courts, when refusing to give effect to wills made under their influence, have professed to do so not upon the ground that the testators were subject to insane delusions; but that, in making their wills, they were the subjects of undue influences. With respect to the many diverse religious beliefs in the world, but few can possibly be true, and both courts and juries would hesitate to affirm that persons believing the others were either insane, or the subjects of insane delusion. When we come to beliefs in witchcraft and in spiritualism, the question is involved in more doubt, but as it is here impossible to prove that persons do not have communication with the spirits of the departed, or that there are not witches and persons under their influence, the courts will not judicially declare that a belief in either is a delusion, insane or otherwise. Where a belief in witchcraft was insisted upon as sufficient evidence of insanity, the court ruled otherwise, saying: "From the visits of the angels to Lot and others of the patriarchs (without referring to the scenes in the garden of Eden), down to this time, when the spirits, like Poe's stately midnight raven, come gently rapping, rapping at the chamber-door of modern mediums, some of whom are eminent persons, the world—pagan, Jewish, and Christian—have, to a greater or less extent, believed in spiritual existences, some being good and some evil, which have maintained a connection with, and manifested their powers through, human beings, in case of the witch of Endor or even raising the dead; while scarcely any pretend to be and no one in fact is, able to explain the mystery, to unfold the manner of their operations, or lay down the laws governing them. The prevalence of the belief, however, and the authority on which it rests, are sufficiently extensive and respectable to shield any individual indulging it from the charge, if not of weakness, at least of insanity, on account of such belief": *Addington v. Wilson*, 5 Ind. 139; 61 Am. Dec. 81. These remarks are equally applicable to a belief in the doctrine of metempsychosis, or any other belief in a matter regarding our future state. "The insanity of an opinion must be established only with reference to means of knowledge accessible to men of common minds and understanding, and not upon the results of profound scientific researches or experiment, or scholastic theology, or religious tenets concerning the matter of the infinite, or the tendency of the race beyond the present, which, itself, is too vast and mysterious a ground for the finite mind to comprehend; and if we are so much at fault, or deficient, and so

at variance in opinion of the truth of the present; how can we presume to hold one insane, as to our nature and destiny in the future": Bonard's Will, 16 Abb. Pr., N. S. 185; Matter of Forman's Will, 54 Barb. 289; Thompson v. Quimby, 2 Bradf. 449.

*So many have Believed in Dreams, in Ghosts, in Divining Rods, in Fortune Tellers, in Alchemy, in Clairvoyance, in the Philosopher's Stone, and in Every Sort of Absurdity* that we cannot regard any of these believers as insane, unless we go further, and adopt a view which contains in it as large an element of truth as any other, namely, that no person is sane. Undoubtedly all beliefs must create in the mind of all persons regarding them as absurd a suspicion of a want of sanity on the part of the believers, and this suspicion grows into conviction when it is shown that the belief has dominated the mind of the believer to the extent that he yielded to it, rather than to the voice of affection, of experience, or of reason. The mere fact that a person believes in witchcraft, in dreams, in clairvoyance, spiritualistic mediums, etc., standing alone, is not satisfactory evidence of his want of sanity: Addington v. Wilson, 5 Ind. 137; 61 Am. Dec. 81; Claffin Will case, 32 Wis. 557; but evidence of these facts is admissible when the inquiry is in respect to his sanity, and may be sufficient, in connection with other evidence, such as being enfeebled by old age or illness, to show insanity, or, at least weakness of mind and the surrender of his own will to some supposed exterior influence: Woodbury v. Obear, 7 Gray, 467.

*The Truth of a System of Theology, or of a Belief in Future Rewards and Punishments*, or respecting the condition of the soul after death or before this life, cannot be made the subject of judicial inquiry and decision, and even though some system of theology may be recognized by law, and hence accepted by legislators and judges, or the great majority of them, as true, it cannot be held that persons entertaining a different religious faith are wholly or partially insane: Weir's Will, 9 Dana, 434; Robinson v. Adams, 62 Me. 405; 16 Am. Rep. 473; Gass v. Gass, 3 Humph. 278.

*The Courts will not, however, Sustain Wills or Other Dispositions of Property made under the Domination of religion, spiritualism, mesmerism, clairvoyance, fortune telling, or other kindred beliefs or faiths*, where it appears probable that the testator surrendered his own will, affection, or judgment, and substituted in its place what he supposed to be a command or recommendation from such supernatural sources. Where it appeared that a testator became a religious enthusiast and a believer in faith cures, and made many donations to institutions devoted to such cures, that, failing to gain converts amongst his neighbors and his own family, he grew cold toward them, and seemed to feel that it was his duty to reject them if they persisted in refusing to obey the teachings of his faith, and that entertaining these views, he disinherited his children and gave his estate to the institutions in which he had become interested, the court said: "From this glance at the facts it is apparent that the general sanity of the testator is not denied. Upon all subjects except one he seems to have acted as other men act, and to have entertained opinions such as many admittedly sane

men hold. The allegation is that upon one subject he was under a delusion which for many years controlled his action, and which led him at last to disinherit his children. The point is a narrow one. His views about faith were extreme, but they are substantially held by many persons whose sanity is not questioned. His belief in the possibility of cures as the result of the exercise of faith on the part of the patient or healer, or both together, is a belief practically identical with that held by many other persons who reject all remedies when sick, and rely on what is variously called faith cure, mind cure, Christian Science, or the like. The question is not so much what he believed on these subjects, as what effect had his beliefs on his mental condition. Did his beliefs unsettle his judgment, and leave him under the influence of a delusion that usurped the place of reason and controlled his will? If this was his condition, then, as to this subject, he did not have a 'sound and disposing mind and memory,' although as to every other subject his soundness be conceded": *Taylor v. Trich*, 165 Pa. St. 586; 44 Am. St. Rep. 679.

*Undue Influence of Spiritualism.*—It has been necessary to apply the principles to which we have just referred to cases involving a belief in spiritualism, more frequently than to those involving any other form of belief. It may be regarded as judicially established that spiritualism is not, in law, either insanity or an insane delusion, and that, standing alone, it does not constitute evidence of mental unsoundness: *In re Spencer*, 96 Cal. 448; *Whipple v. Eddy*, 161 Ill. 114; *Otto v. Doty*, 61 Iowa, 23; *Brown v. Ward*, 53 Md. 376; 36 Am. Rep. 422; *McClary v. Stull*, 44 Neb. 175; *Middleditch v. Williams*, 45 N. J. Eq. 735; *La Bau v. Vanderbilt*, 3 Redf. 384; *Will of Smith*, 52 Wis. 543; 38 Am. Rep. 756; *Thompson v. Hawks*, 14 Fed. Rep. 902; *Orchardson v. Cofield*, 171 Ill. 14; post, p. 211. In one case it appeared that a grantor whose conveyance was sought to be annulled "had for a long time had an hallucination that she could see fairies; conversed with them; set the table for them; thought sticks of wood fairies; wanted to keep on the good side of them; imagined she could see departed spirits, particularly of her children; imagined she could see their whitened bones, and could not be led to believe but that some of them were dead; called people's attention to seeing their spirits out in the road"; but the court held that all this did not show that she was insane: *Lewis v. Arbuckle*, 85 Iowa, 335. In this case there was, however, ample evidence respecting the general condition of the mental faculties of the person whose competency was in question, and it appeared that her capacity, except in reference to the alleged delusion, was good, and that the will assailed was not affected by them. If on the other hand, it is shown that the act in question was the result of a belief, and that in doing what he did the believer was dominated by his belief and supposed himself to be acting in obedience to some communication received from the spirit world, the act or deed cannot be regarded as his and successfully asserted against him or his heir at law: *Robinson v. Adams*, 62 Me. 405; 16 Am. Rep. 473; *McClary v. Stull*, 44 Neb. 189; *Greenwood v. Cline*, 7 Or. 17. If a testator makes a disposition of his property in favor of



one he believes able to communicate with departed spirits, or in favor of his religious teacher or adviser, further evidence of the influence under which the disposition was made is unnecessary to defeat it. It is presumed to have been the fruit of undue influence over the testator by the spiritualistic medium or religious adviser or teacher: *Connor v. Stanley*, 72 Cal. 556; 1 Am. St. Rep. 84; *Leighton v. Orr*, 44 Iowa, 679; *Schofield v. Walker*, 58 Mich. 96; *Marx v. McGlynn*, 88 N. Y. 357; *Thompson v. Hawks*, 14 Fed. Rep. 902; *Lyon v. Holme*, L. R. 6 Eq. C. 653; *Orchardson v. Cofield*, 171 Ill. 14; post, p. 211.

*Insane Delusions and Testamentary Capacity may Coexist.*—In the first paragraph of this note, we quoted from the opinion of an eminent English judge written in the latter half of the present century, language affirming that a person could not be held to have the requisite testamentary capacity to dispose of his property by will if he were, at its execution, partially insane, or, in other words, subject to an insane delusion, though not in respect to any matter affecting the disposition so made by him of his property. Long before the decision referred to, Sir John Nicholl had, in *Dew v. Clarke*, 1 Add. Ecc. 279, assumed that partial insanity upon a particular subject, or rather respecting or against a particular person, might be a material subject of inquiry, and that being established, might prove sufficient to invalidate a will attempting to disinherit the person against whom the partial insanity existed; and subsequently pronounced the will in question void because of such partial insanity, though the testator was in other respects shown to be possessed of good mental capacity: *Dew v. Clarke*, 3 Add. Ecc. 79. Nevertheless, when the question was ultimately presented for decision to the court of queen's bench in 1870, Chief Justice Cockburn regarded it as substantially a new question, showing in the course of his opinion that the cases which had apparently affirmed that a testator's will must necessarily be void if made while he was partially insane, did not necessarily involve that question, because they "were cases of general, and not of partial, insanity; in both the delusions were multifarious, and of the wildest and most irrational character, abundantly indicating that the mind was diseased throughout. In both there was an insane suspicion or dislike of persons who should have been objects of affection; and, what is still more important, it was palpable that the delusions must have influenced the testamentary disposition impugned. In both these cases, therefore, there existed ample ground for setting aside the will without resorting to the doctrine in question." The chief justice further declared that the court felt at liberty to consider for themselves the principle properly applicable to the case then before them, and that "the senses, the instincts, the affections, the passions, the moral qualities, the will, perception, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind. The pathology of mental disease and the experience of insanity in its various forms teach us that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, in other instances one or more only of these faculties or

functions may be disordered, while the rest are left unimpaired and undisturbed; that while the mind may be overpowered by delusions which utterly demoralize it and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions, which, though the offspring of mental disease, and so far constituting insanity, yet leave the individual in all other respects rational and capable of transacting the ordinary cares and fulfill the duties and obligations incident to the various relations of life. No doubt when delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound; just as the body, if any of its parts or functions is affected by local disease, may be said to be unsound, though all its other members may be healthy, and their powers or functions be unimpaired. But the question still remains, whether such partial unsoundness of the mind, if it leaves the affections, the moral sense, and the general power of the understanding unaffected, and is wholly unconnected with the testamentary disposition, should have the effect of taking away the testamentary capacity." The chief justice next proceeded to consider the jurisprudence of other countries, seeking, but not finding, guidance from the ancient and modern writers upon civil law. Relying, therefore, more upon principle than upon precedent, he reached the conclusion that, "if the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicions, or aversions, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions, calculated to interfere with and destroy its functions, and to lead to a testamentary disposition due only to their baneful influence; in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand"; and "if the mind, though possessing sufficient power, undisturbed by frenzy or delusion, to take into account all the considerations necessary to the proper making of a will, should be subject to some delusion, but such delusion neither exercises, nor is calculated to exercise, any influence on the particular disposition, and a rational and proper will is the result," then that we ought not to deny to the testator the capacity to dispose of his property: *Banks v. Goodfellow*, L. R. 5 Q. B. 549, 560; 565; *Boughton v. Knight*, 3 P. & M. 64; *Smee v. Smee*, 49 L. J. P. & M. 8; *Jenkins v. Morris*, L. R. 14 Ch. Div. 674.

*Insane Delusions, When do not Affect Testamentary Capacity.*—The American decisions concede more unreservedly than the English, that the same person may be, at the same moment, sane as to some subjects and insane as to others, and though he is proved to be subject to some, or even to many, insane delusions, he may, notwithstanding, have ability to contract or to make testamentary disposition of his property. In truth, these delusions can scarcely be regarded as evidence of general insanity, and when evidence of them is opposed by other evidence tending to prove the general competency of the person whose mind is in question to attend to his own affairs, and to dispose of them with sagacity, or, at least,

in obedience to the free impulses and motives of his mind, his contracts and his dispositions of his property, testamentary and otherwise, must be treated as valid, unless connected in some way with his insane delusions: *Lucas v. Parsons*, 24 Ga. 640; 71 Am. Dec. 147; *Maynard v. Tyler*, 168 Mass. 107; *Rice v. Rice*, 50 Mich. 448; *Bovard v. State*, 30 Miss. 600; *Benoist v. Murrin*, 58 Mo. 307; *Boardman v. Woodman*, 47 N. H. 120, *Hollinger v. Syms*, 37 N. J. Eq. 221; *Shaw's Will*, 2 Redf. 107; *Potter v. McAlpine*, 3 Dem. 122; *Jones v. Hughes*, 15 Abb. N. C. 141; *Matter of Vedder*, 6 Dem. 92; *Thompson v. Thompson*, 21 Barb. 107; *Shreiner v. Shreiner*, 178 Pa. St. 57; *Puryear v. Reese*, 6 Cold. 21; *Denson v. Beazley*, 34 Tex. 191. Doubtless there are many cases where delusion or monomania confessedly exists, but is so clearly irrelevant to the transaction assailed that the one cannot be deemed to have any connection with the other, and hence the transaction must be judged precisely as if the person entering into it were wholly sane: *Gardiner v. Lamback*, 47 Ga. 133; *Trumbull v. Gibbons*, 22 N. J. L. 117; 51 Am. Dec. 253; *Potter v. Jones*, 20 Or. 252; *Smee v. Smee*, L. R. 5 P. D. 84, and many other cases in which the delusions are so varied, gross, and improbable as to indicate general mental impairment: *Burkhart v. Gladish*, 123 Ind. 337; *Stanton v. Wetherwax*, 16 Barb. 259; *Gordon v. Whitlock*, 92 Va. 723; or are of such a character that, though general mental soundness is concluded, the transaction assailed may be the fruit of the insane delusion. In any of these events, the problem presented is entirely different from that involved when general insanity does not appear, and there is no apparent connection between the insane delusion and the act which is in question because of it: *Re Redfield's Will*, 116 Cal. 637; *Maynard v. Tyler*, 168 Mass. 107; *Will of Cole*, 49 Wis. 179.

*Insane Delusions Destroying Testamentary Capacity.*—Where insane delusion exists, and a testamentary disposition or any other act is confessedly the fruit of it, such disposition or act is infected by the lunacy to the same extent as if total insanity were shown. It is not material that sanity existed in reference to other subjects or transactions. These, when drawn in question, may be sustained. It is otherwise with those transactions which are presumed, or by competent evidence, proved, to be the result of an insane delusion: *Estate of Carpenter*, 94 Cal. 406; *Potts v. House*, 6 Ga. 357; 50 Am. Dec. 329; *Hay v. Millier*, 48 Neb. 156; *Lathrop v. Board of Missions*, 67 Barb. 590; *Merrill v. Ralston*, 5 Redf. 254; *Tawney v. Long*, 76 Pa. St. 103; *Puryear v. Reese*, 6 Cold. 21; *Waring v. Waring*, 6 Moore P. C. C. 341; *Banks v. Goodfellow*, L. R. 5 Q. B. 549.

*Insane Delusions Creating Aversions against Heirs.*—If general capacity exists, a delusion which will defeat or avoid a testamentary disposition, whereby those who are otherwise objects of the testator's bounty are wholly or partly deprived thereof, may be either with respect to those persons or the persons in whose favor they are disinherited; or the delusion may be that it has become the duty of the testator to deprive his heirs of his bounty, though he has no delusion respecting them personally, and they are still the objects of his affection and even of his solicitude; or perhaps the mind of the testator has reached that condition in which he is indifferent to his



property, and the advantages which its possession may confer on those who survive him. Of course the most frequent illustrations of insane delusion resulting in testamentary dispositions of property adverse to the interests of heirs at law, and others apparently entitled to the testator's favorable consideration, are those found where it appears that he has had a false belief respecting some matter of fact which, if true, would naturally lead him to dislike, or at least not to favor, the persons affected by such belief, as, where the delusion is that a child is the offspring of a wife's adultery: *Chaney v. Bryan*, 16 Lea, 63; or that such child, though legitimate, had cheated or otherwise acted dishonestly toward the testator: *Kastell v. Hillman*, 53 N. J. Eq. 49; or had treated him with a want of filial respect and affection, or has become a criminal. In truth, whatsoever be the nature of the false belief respecting the natural object of the testator's bounty, if it be founded in delusion and be of a character which, if true, would probably induce an aversion, or, at all events, a diminution of the affection, previously entertained, or a belief that the person adversely affected by it was less worthy or less needy than the testator had previously believed, a testamentary disposition apparently or probably due to the delusion cannot be sustained: *Cotton v. Ulmer*, 45 Ala. 378; 6 Am. Rep. 703; *Wetter v. Habersham*, 60 Ga. 194; *American Bible Soc. v. Price*, 115 Ill. 623; *Johnson v. Moore*, 1 Litt. 372; *Thornton v. Appleton*, 29 Me. 298; *Rivard v. Rivard*, 109 Mich. 98; post, p. 566; *Stanton v. Wetherwax*, 16 Barb. 259; *Lathrop v. Board of Foreign Missions*, 67 Barb. 590; *Merrill v. Ralston*, 5 Redf. 220; *Colhoun v. Jones*, 2 Redf. 34; *Riggs v. American Tract Soc.*, 95 N. Y. 503; *Taylor v. Trich*, 165 Pa. St. 586; 44 Am. St. Rep. 679; *Ballantine v. Proudfoot*, 62 Wis. 216.

*Delusions Creating Bias in Favor of Legatees or Devisees.*—An insane delusion, though not resulting in prejudice toward an heir at law or other natural object of the testator's bounty, may create a bias in favor of some other person or object, thus inducing a disposition in his or its favor due wholly to the delusion. Where such is the case, the will cannot stand. Delusions of this character have rarely been presented for judicial consideration, either because they are extremely infrequent, or because they have been deemed the fruit of undue influence, and have been considered in connection with that question. A delusion to the effect that the principal legatee was the testator's son will avoid the will so far as in his favor: *Floreys v. Florey*, 24 Ala. 241. A remarkable case is that of *Orchardson v. Cofield*, 171 Ill. 14; post, p. 211. It illustrates both the principle we are here considering, and the one to which we have heretofore referred, that a will may be regarded as the product of an insane delusion when it is the result of a belief in spiritualism. Orchardson met a widow, then eighty-three years of age, possessed of a considerable fortune, and a believer in spiritualism. He was some fifteen years her junior, and, on meeting her, had a previous knowledge of her belief. He claimed he was in direct communication with the spirits, who addressed him as "the son of wisdom," and by other laudatory titles, and spoke of his powers as of a kindred character to those attributed to Jesus Christ. He spent

much of his time at the widow's house engaged in writing a book, which he had printed at her expense, and which was entitled "The Light of Ages and Death Blow to Poverty," and was dedicated to her. Soon afterward they were married, and the marriage was succeeded in due time by her death, preceded by her making a will in his favor. Both the will and the marriage were subsequently declared void as being the products of her insane delusions and infatuations respecting spiritualism, and her exalted idea of the person whom she had married, although it was shown that she was not generally insane, and had mental capacity to transact and to understand ordinary business. The court said, speaking of her husband and his relation toward her: "He was in no rational sense the object of her bounty, nor can we believe from this evidence that she was influenced to so treat him except through the delusion referred to. The gift to him was not prompted by a desire or sense of duty to provide for him as a man, but because she had been, by reason of her diseased mind, and through the influence and desire of Orchardson made to believe that he was more than a man, gifted with superhuman faculties. She believed it her duty to bestow her property upon him because of her morbid insane delusions of him, and we repeat, as we said in the Price case, 115 Ill. 638, it appearing that such insane delusion in regard to her duty or obligation to make a will in his favor, was the result of that insane delusion, the will cannot be sustained."

*A Delusion in Favor of a Particular Object* inducing a testamentary disposition to aid in its promotion may exist either when the testator has a delusion respecting the necessity of promoting such object in order to secure his future welfare, or at all events, that there is a moral duty resting upon him to disregard the claims of his heirs at law and give preference to the object in question. Hence it was held when it was shown that a testator had an insane delusion to the effect that his body was to be preserved to the end of time, and that it would therefore be necessary to have a place perpetually suitable for its protection, and he, on this account, excluded his relatives from his will and gave his property to a church, because he thought, by so doing, he would have his body properly preserved and cared for, that the will must be set aside: *Morse v. Scott*, 4 Dem. 507. Somewhat similar was the case of *Taylor v. Trich*, 165 Pa. St. 586; 44 Am. St. Rep. 679. The testator, whose will was involved in this case, became a believer in the subject of faith cures, and his attention was attracted to certain institutions said to rest on no pecuniary foundation or endowment, but on the faith of those conducting them. One of these was situated in England and the other in America. During his life, the testator gave freely from his means to both of these institutions, and manifestly became somewhat estranged from his relatives because they did not share in his belief upon the subject of faith cures, nor in his partiality toward the institutions in question. Finally he made his will disinheriting his children and giving his entire estate to the American and English institutions, expressly stipulating that the part given to the former should be used "for the support of a faith training college and the free distribution of the holy Scriptures." There was

apparently no reason for his disinheriting his children, as their characters and habits seemed to be altogether unexceptional, judged by the view of any person other than their father, but he had stated that they "were such he did not know whether the Lord wanted to have anything to do with them," and that "the Lord had bid him to leave them to themselves." The court was manifestly of the opinion that the beliefs which the testator entertained about these faith cures, and in connection with them, about his children, amounted to an insane delusion, on account of which his will ought to be disregarded. Where it appeared that a testator had complained that he was harassed with agents for churches, orphan asylums, colleges, schools, and missionary societies, all seeking to obtain money for religious and benevolent purposes, and holding out as inducements to make such gifts that the testator's future happiness depended upon his liberality, and that he had thereafter said that he intended to place his money where it would roll up and work for him until the day of judgment, and in his will, after giving his wife an interest in certain real property for life and making a small provision for his daughter, he devised and bequeathed the balance of his estate to the American Bible Society and to the Missionary Society of the Methodist Episcopal Church, and that the testator suffered from various delusions, the court held that the jury was warranted in finding that the will in question was void, because the fruit of the testator's delusion or belief that in making it and disinheriting his daughter he was obeying the moral duty of providing for his eternal welfare: *American Bible Soc. v. Price*, 115 Ill. 623.

*Insane Delusions Respecting Property or its Value.*—A grantor or testator may, through insane delusion, have become indifferent to his property, because such delusion has led to a belief that it will be of no advantage to him or his heirs, or that they will not live to enjoy it. If so, a disposition of it made under the influence of such belief may be set aside. Where a deed was assailed as being the result of insane delusion, the trial court ruled "that the insane delusion was such that the party, though knowing that she was making a deed and what its legal effect would be, yet was rendered entirely indifferent to property by an insane delusion that she was about to perish, or that others, who would be affected injuriously, were about to perish, so that she was incapacitated from a rational care for her interests or theirs, the deed may be avoided." This ruling, when challenged in the appellate court, was sustained, that court saying: "It embraced all the essential elements which are necessary to constitute mental incapacity as applied to the subject matter, and left the question to the jury to determine whether these elements were proved to have existed in the condition of the grantor's mind at the time she executed the deed to the tenant. If it appeared that she was affected with mental disease which had culminated in a delusion that she, and those who would inherit her property, or for whose pecuniary interest and welfare she would, in the exercise of reason, have provided, were about to perish, and that thereby she was rendered indifferent to property and incapable of appreciating its uses and value, and had become reckless of, and insensible to, her own interest or the interests of those



dependent upon her, or connected with her, she certainly was not competent to make a valid disposition of her property by deed. Such irrational and insane delusion would be directly connected with the act and incapacitate her from understanding its nature or character and the result which would flow from it": *Bond v. Bond*, 7 Allen, 1.

*Criminal Responsibility of Persons Subject to Insane Delusions.*—When as a defense to a prosecution for the commission of a crime, it is claimed that the accused is not guilty, and ought not to be punished because, though he did the act or deed with which he is charged, he was dominated by insanity, complete or partial, it is generally held that his defense cannot be sustained, unless his condition at the doing of the act in question was such that he was incapable of distinguishing between right and wrong with respect to the particular act of which he was guilty: *State v. Lawrence*, 57 Me. 574; *Cunningham v. State*, 56 Miss. 269; 31 Am. Rep. 360; *State v. Wright*, 134 Mo. 404; *Mackin v. State*, 59 N. J. L. 495; *Regina v. Burton*, 3 Fost. & F. 772; *Regina v. Townley*, 3 Fost. & F. 839. That the defendant was laboring under an insane delusion may be entirely immaterial, as where it is conceded that he was not wholly insane, and it appears that the delusion to which he was subject was upon some matter entirely disconnected with his criminal act: *State v. Gutt*, 13 Minn. 343.

*Moral Insanity.—Uncontrollable Impulse* is sometimes urged as a defense, as the equivalent of insanity. If this is a species of insanity, it must be classed as moral insanity, which, as we have already shown, is not ranked as an insane delusion. The law does not, according to the decided preponderance of authority, recognize uncontrollable impulse as coexistent with a mind capable of distinguishing between right and wrong, and of knowing that the act done was wrong, or forbidden by law. Having this extent of capacity, the duty of controlling one's impulses so that they shall not stray into forbidden ways is imperative and unavoidable. In truth, there are no means by which to judicially determine whether a criminal impulse, which has been yielded to, is uncontrollable or not, unless by accepting the statement of the criminal upon that subject. To accept it would be extremely dangerous, and would probably tend to the indefinite enlargement of uncontrollable impulses. Hence the many decisions maintaining that if the accused had the capacity to distinguish between right and wrong and to know that the act he was doing was wrong or unlawful, he cannot escape punishment on the ground that he was dominated by an uncontrollable impulse: *People v. Hubert*, 119 Cal. 216; 63 Am. St. Rep. 72; *Boswell v. State*, 63 Ala. 307; 35 Am. Rep. 20; *People v. Hoin*, 62 Cal. 120; 45 Am. Rep. 651; *People v. McCarthy*, 115 Cal. 255; *Marceau v. Travelers' Ins. Co.*, 101 Cal. 338; *Genz v. State*, 59 N. J. L. 488; 59 Am. St. Rep. 619; *People v. Burgess*, 153 N. Y. 561; *State v. Bundy*, 24 S. C. 444; 58 Am. Rep. 262; *State v. Alexander*, 30 S. C. 74; 14 Am. St. Rep. 879; *State v. Levelle*, 34 S. C. 120; 27 Am. St. Rep. 799; *Leache v. State*, 22 Tex. App. 279; 58 Am. Rep. 638; *Taylor v. United States*, 7 App. D. C. 27; 23 Wash. L. Rep. 433. There are cases, however, which impose some limitations

upon, or exceptions to, the rule which we have stated, and among them, decisions which apparently recognize moral insanity or uncontrollable impulse as a defense. The first modification to which we shall here refer, are those cases which exact as essential elements of criminal responsibility not only the capacity to distinguish between right and wrong with respect to the act in question, but also the ability to choose, by an effort of the will, whether the act shall be committed or not: *Fouts v. State*, 4 G. Greene, 500; *Stevens v. State*, 31 Ind. 485; 90 Am. Dec. 634. In *Wilcox v. State*, 94 Tenn. 106, it appeared that the defendant, who unquestionably had committed a homicide, was addicted to the excessive use of morphine and cocaine, and it was insisted that, as a result of this use and of certain hereditary tendencies, his mind had been so filled with the delusions of a disordered brain as to overpower his will and render him without responsibility for acts done under the influences and in the directions of his delusions. The court, in determining the questions presented to it upon appeal from a judgment of conviction, said that the question was not so much that of sanity as of responsibility, and it gave the following illustrations or instances of persons having delusions whom we must nevertheless, regard as sane: "Many men of strong minds have delusions. Remarkable instances are given, in the works on medical jurisprudence, of delusions in men of prominence in all the walks of life. Lord Kenyon had an unreasonable fear of poverty, and so did Lord Stowell, although he was a man of immense fortune. His home was absolutely destitute of the necessities and comforts of life. Lord Erskine would never sit at a table, or remain in company, as one of thirteen persons. Lord Eldon, after he had made up his mind and expressed his opinion lucidly and conclusively, was at all times a prey to grave doubts of his correctness. Lord Brougham, upon more than one occasion, was placed in seclusion, his mind being clearly off balance. Judge Brackenridge, of Pennsylvania, is reported to have on a hot day, while holding court at Sunberry, gradually taken off his clothes, until he sat naked on the bench. Judge Baldwin, of the United States supreme court, was a hypochondriac. A distinguished New England judge imagined that a dropsical affection under which he labored was a sort of pregnancy, and yet none of these men were insane, because they had reason and sanity enough to overcome their delusions: See, on this subject, Wharton and Stille's Medical Jurisprudence, secs. 34-52, 732-743, where other cases are mentioned. A familiar illustration is that of the Mormon elders, who claim that they have a direct revelation from heaven, permitting them to practice and teach polygamy. The world generally regards this as rank heresy, and the claim to be evidence of an unreasonable delusion. It has, however, been held that they cannot defend on the ground of such delusion, inasmuch as they are sane, shrewd, active, successful, and usually practical men in their business and social relations, and they have been held responsible for such delusions: Wharton on Criminal Laws, secs. 84, 850, 162; *Reynolds v. United States*, 98 U. S. 145. 'An uncontrollable impulse of the mind, coexisting with the full possession of the reasoning powers, will not warrant an acquittal on the ground of insanity,

but the question is always whether the accused, at the time he committed the act, knew its nature and character, and that it was wrong': Wharton and Stille's Medical Jurisprudence, sec. 152, note 1." The instruction in this case by the trial judge was to the effect that insane or false delusions on the part of the accused "must be of such a character as to deprive him of his will power, and have such control over him as to force him to do the act without the power of controlling his mind and will, and render him unable to resist the impulses to do the act," and that if the jury "should be satisfied that the defendant did the shooting under or by the influence of such false and insane delusions as found him without power to resist them, he should be acquitted." In this case, however, notwithstanding this instruction, very favorable to the defendant, he was convicted, and the decision can hardly be regarded as one in favor of uncontrollable impulse as a defense in behalf of a party who was able to distinguish right from wrong. Judge Harrington in his charge to the jury in *State v. Windsor*, 5 Harr. (Del.) 512, told the jury that the test of criminal responsibility on the part of the prisoner was, whether he had a state of mind capable of the perception or consciousness of right or wrong, as applied to the act he was about to commit, and had the ability, through that consciousness, to choose, by an effort of the will, whether he would do the deed which he knew to be wrong. In Kentucky, the doctrine of moral insanity and the consequent exemption of persons afflicted with it from punishment seem to be conceded. The court quoted, with apparent approval, language describing moral insanity as arising "from the existence of some of the natural propensities in such violence that it is impossible not to yield to them. It bears a striking resemblance to vice, which is said to consist in an undue excitement of the passions and will, and in their irregular or crooked actions leading to crime. It is, therefore, to be received with the utmost scrutiny. It is not generally admitted in legal tribunals as a species of insanity which relieves from responsibility from crime, and it ought never to be admitted as a defense until it is shown that these propensities exist in such violence as to subjugate the intellect, control the will, and render it impossible for the party to do otherwise than to yield. Where its existence is fully established, this species of insanity relieves from accountability to human laws": *Scott v. Commonwealth*, 4 Met. (Ky.) 227; 83 Am. Dec. 461. In an attempt to state the rule upon this subject, the supreme court of Illinois in *Hopps v. People*, 31 Ill. 385; 83 Am. Dec. 231, said: "We do not propose to go into an examination of the various decisions, English and American, on this subject, it being sufficient to say that no certain, uniform, and definite rule can be gathered from them. In the midst of this uncertainty, with the best reflection and examination we have been able to give to this very important and most interesting question, we have come to the conclusion that a safe and reasonable test, in all such cases, would be, that whenever it should appear from the evidence that at the time of doing the act charged the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he



ought to be acquitted. But this unsoundness of mind, or affection of insanity, must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them. If it be shown the act was the consequence of an insane delusion, and caused by it, and by nothing else, justice and humanity alike demand an acquittal. Our statute was designed to ameliorate the rigor of the old rule of the common law, in declaring that a person "affected with insanity" shall not be considered a fit subject of punishment, for an act done which, under other circumstances or disposition of mind, would be criminal. The rule we have endeavored to prescribe seems to fulfill this demand of the statute." By the test thus formulated, the courts of that state have professed to be guided in their more recent decisions: *Meyer v. People*, 156 Ill. 126; *Lilly v. People*, 148 Ill. 467. The supreme court of Alabama, after an exhaustive examination of the subject, has concluded that "the unconsciousness of right and wrong is one thing, and the powerlessness, through cerebral defect or disease, is another," and that the "inquiries to be submitted to the jury in every criminal trial where the defense of insanity is interposed, are these: 1. Was the defendant at the time of the commission of the alleged crime, as a matter of fact, afflicted with a disease of the mind, so as to be either idiotic or otherwise insane? 2. If such be the case, did he know right from wrong as applied to the particular act in question? If he did not have such knowledge, he is not legally responsible; 3. If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions concur: (1) If, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; (2) And if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely": *Parsons v. State*, 81 Ala. 577; 60 Am. Rep. 193. The opinion of Chief Justice Dillon in *State v. Felter*, 25 Iowa, 67, clearly shows that he was not satisfied with what he characterized as the right and wrong test, and that in his judgment the accused might be irresponsible, and hence entitled to acquittal, if, though knowing that what he did was wrong, he was yet driven to it "by an uncontrollable and irresistible impulse arising, not from natural passion, but from an insane condition of the mind." Similar views prevail in Indiana, the supreme court of which has said: "A person may have sufficient mental capacity to know right from wrong and to be able to comprehend the nature and consequences of his act, and yet be not criminally responsible for his acts; for, if the will power is so impaired that he cannot resist an impulse to commit a crime, he is not of sound mind: *Goodwin v. State*, 96 Ind. 550, and the cases cited in *Conway v. State*, 118 Ind. 482. If the lack of will power is the result of a diseased state of mind, there is mental unsoundness within the meaning of the law. But if the will is simply overborne by ungoverned passion, there may be criminal

responsibility": *Plake v. State*, 121 Ind. 433; 16 Am. St. Rep. 408. To the same effect is *Roberts v. State*, 3 Ga. 310, 331.

Whether there is practically any considerable difference between the courts which admit, and those which deny, that the ability to distinguish between right and wrong with respect to a criminal act is the sole test of criminal responsibility on the part of its doer, may well be doubted. None of the courts shield from conviction persons whose uncontrollable impulses are those of mere passion. The irresponsibility for criminal acts which these decisions tend to sustain can scarcely be deemed to be founded upon irresistible impulse, but rather upon weakness or absence of will forming a part of, or being the result of, mental unsoundness, and this weakness or absence of will is not attributed to persons apparently free from physical and mental disease, but only to those whom the evidence shows to have been the subject of such disease before the commission of the criminal act in question. This topic is not, however, strictly within the scope of our present note, and hence will not here receive further consideration.

*If a Crime is Committed Because of an Insane Delusion on the Part of the Person Committing it*, he is to be judged, so far as his criminal responsibility is concerned, precisely as if the facts which, in his delusion, he believed to be true, were true: *Boswell v. State*, 63 Ala. 307; 35 Am. Rep. 20; *Bolling v. State*, 54 Ark. 588; *Commonwealth v. Rogers*, 7 Met. 500; 41 Am. Dec. 458; *Thurman v. State*, 32 Neb. 227; *McNaughton's case*, 10 Clark & F. 200. Hence, perhaps, in a majority of the cases, the delusion establishes, rather than disproves, criminal responsibility. For where delusion leads to the commission of crime, it is generally because the wrongdoer believes he has suffered some injustice, and, for the purpose of avenging it, inflicts injury upon him whom his delusion points out as the guilty party. If the supposed wrong, as is usually, if not universally, the case, is one which, if it were real, could not lawfully be avenged in the manner employed by the accused, the delusion which dominated him, if it does not increase, at least does not diminish, his crime, and hence does not entitle him to be acquitted of criminal responsibility, unless aside from the particular delusion, he was so affected by mental weakness or disease, that his acquittal must have resulted, if the facts under which he acted were such as, in his delusion, he manifestly believed them to be. Hence it is no defense for one guilty of killing or injuring another that he did so under the delusion that the person thus injured was attempting to marry his mother, or had tried to injure him in his business: *Bolling v. State*, 54 Ark. 588; or had been guilty of an adulterous intercourse with his wife: *Humphreys v. State*, 45 Ga. 192; or had made an attempt to poison him and had actually put poison in his food: *People v. Hubert*, 119 Cal. 216; ante, p. 72; or that the person injured had attempted to kill the defendant by placing giant powder in a certain place in a mine: *State v. Lewis*, 20 Nev. 361; or that the defendant, who had been a convict in a state's prison, believed that the person whom he killed was acting as a spy upon him, and had betrayed a plan of escape: *People v. Taylor*, 138 N. Y. 398. A physician having attended the wife of the accused, the latter

charged him with malpractice and with improper exposure of the person of the wife, and other unprofessional conduct, whereby her health was permanently impaired and her womanly feelings outraged and wounded. A suit was prosecuted against the physician, ending in his favor, and about one year afterward he was killed by the accused. An instruction was asked, that if the jury think from the evidence, that the defendant was laboring under a diseased condition of the mind and was insane on the subject of the manner in which his wife had been treated, and upon the subject that the deceased, with others, had formed a conspiracy to take his life, then the defendant should be acquitted. It was held that this instruction was properly refused, because it failed to present the condition that, before the defendant could be treated as criminally irresponsible, his mental disease must have destroyed his power to comprehend rationally the consequences and nature of his act, and overpowered his will: *State v. Mewherter*, 46 Iowa, 88.

*The Delusions Which Will Justify the Commission of a Crime* on the ground that the person committing it would be justified, if the facts believed by him to be true really existed, are exceedingly rare. If under the influence of a delusion, homicide has been committed, it can be justified only upon the ground that the party taking life sincerely believed himself to be, as an officer of the law or otherwise invested with authority to do what he did, or, where he believed that an attempt was being made to take his own life or to do him great bodily harm, and he acted as he believed in the exercise of his right of self-defense. In *Commonwealth v. Rogers*, 7 Met. 500, 41 Am. Dec. 458, it appeared that the defendant, while a prisoner, had killed the warden of the prison. It was urged in defense that this killing was the result of a delusion or hallucination that the warden had a design to shut the prisoner up and by that pretext to destroy his life, and that the prisoner did what he did for the purpose of preventing the carrying out of what, in his delusion, he believed the warden was about to do. The court said: "Are the facts of such a character, taken in connection with the opinions of the professional witnesses, as to induce the jury to believe that the accused had been laboring for several days under monomania attended with delusion; and did this indicate such a diseased state of the mind that the act of killing the warden was to be considered as an outbreak or paroxysm of disease which, for the time being, overwhelmed and superseded reason and judgment, so that the accused was not accountable? If such was the case, the accused is entitled to an acquittal." In attempting to explain or give illustrations of delusions which would justify the commission of a crime, Baron Martin, in *Regina v. Townley*, 3 Fost. & F. 846, said: "What the law meant by an insane man was a man who acted under delusions, and supposed a state of things to exist which did not exist, and acted thereupon. A man who did so was under a delusion, and a person so laboring was insane. In one species of insanity, the patient lost his mind altogether and had nothing but instinct left. Such a person would destroy his fellow creatures as a tiger would its prey, by instinct only. A man in that state of mind had no mind at all, and therefore was not criminally



responsible. The law, however, went further than that. If a man laboring under a delusion did something of which he did not know the real character, something of the effect and consequences of which he was ignorant, he was not responsible. An ordinary instance of such delusion was where a man fancied himself a king and treated all around him as his subjects. If such a man were to kill another under a supposition that he was exercising his prerogative as a king, and that he was called upon to execute the other as a criminal, he would not be responsible. The result was that if the jury believed that at the time the act was committed, the prisoner was laboring under a delusion, and believed that he was doing an act which was not wrong or of which he did not know the consequences, he would be excused. If, on the other hand, he well knew his act would take away life, that that act was contrary to the law of God and punishable by the law of the land, he was guilty of murder."

*Presumptions and Burden of Proof.*—Though an insane delusion is shown to have existed in the mind of a testator or other person whose competency is in question, it by no means follows either that it was present or affected him at the time of doing the assailed act, or that, if present, that it controlled him, so that such act can be affirmed to have been the result of the delusion, rather than of motives existing independent of it. Whether, when an insane delusion has been proved to have existed at a period anterior to the act in question, there is a presumption respecting its continuance, is a question by no means free from doubt. When general lunacy is established, we understand the law to be, that the burden must be assumed by those who claim that an act has been done during a lucid interval: *State v. Hayward*, 62 Minn. 474; *Wright v. Jackson*, 59 Wis. 569; *Ripley v. Babcock*, 13 Wis. 425. We believe the weight of authority is in favor of the application of the same rule to partial insanity, or, in other words, to insane delusions, unless they are affirmatively shown to be intermittent. Hence if a testator is proved to have had, before the execution of a will or other instrument, an insane delusion which, if existing at its execution, must avoid it, the presumption, in the absence of all further evidence upon the subject, is that the delusion continued: *Townshend v. Townshend*, 7 Gill, 10; *Shaw's Will*, 2 Redf. 107; *Gombault v. Public Admr.*, 4 Bradf. 226; *Jenckes v. Court of Probate*, 2 R. I. 255; *Boughton v. Knight*, L. R. 3 Pro. & D. 64; *Grimani v. Draper*, 12 Jur. 925; *Smith v. Tebbets*, L. R. 1 Pro. & D. 398; *Waring v. Waring*, 6 Moore P. C. C. 341; *Princep v. Dyce Sombre*, 10 Moore P. C. C. 232. Undoubtedly, if the delusion in question was manifested only during the progress of an illness to which it may reasonably be referred, and which has since terminated, it is unreasonable to presume that after the illness had exhausted itself, the delusion which was a part of it remained: *Staples v. Wellington*, 58 Me. 454; *Turner v. Rusk*, 53 Md. 65; *State v. Hayward*, 62 Minn. 474; *Lee v. Scudder*, 31 N. J. Eq. 634. In some cases, it is said that there is no presumption of law upon this subject, and that the jury must be left to infer from all the evi-

dence whether or not the delusion continued: *Gillespie v. Shull-iberrier*, 5 Jones, 157; *Manley v. Staples*, 65 Vt. 370.

An insane delusion may be of a character naturally tending to affect a will or other instrument, and still that instrument may not be due to it, and may be such as the testator or other person whose act is in question would have executed had he been free from delusion. Obviously it must often be impossible, where delusion and general competency are shown to coexist, to prove that an act was due to the one rather than to the other. Hence, the question naturally presents itself, Is there any presumption under such circumstances either that the act was or was not the result of the insane delusion? There are several decisions involving the question of testamentary capacity in which the courts have considered the will in question, and concluded that the mind of the testator was free from delusion when making it, because, in their judgment, the dispositions of his property as made by him, were sensible, proper, and judicious: *Chandler v. Barrett*, 21 La. Ann. 58; 99 Am. Dec. 701; *Weir's Will*, 9 Dana, 434. But as testamentary capacity does not depend upon approval by the courts of the dispositions made in wills, the test thus sought to be applied, if proper under any circumstances, is generally too unsatisfactory to be of any considerable assistance. In England, the question whether an insane delusion, though of a character which probably affected the instrument and led to its execution, really dominated the mind, so that the instrument is to be deemed the fruit of the delusion, must be submitted to the jury. An owner of land was under a delusion that he, it, and many of the things about and upon it and him were impregnated with sulphur, and while under such delusion, he granted a lease which, after his death, his representatives sought to avoid. They proved, beyond question, the existence of the alleged delusion, and that the decedent had taken many steps for the purpose of getting rid of the sulphur, such as taking castor oil in large quantities, boring holes in doors, tearing down buildings, plowing up part of the land, and selling certain livestock which he believed to be infected, and that he considered the land no longer habitable because of the presence of the sulphur. In opposition to this testimony, it was proved that the decedent attended to his business with sagacity, visited fairs and there made bargains, and looked sharply to his own interests. It was held that the judge could not, under these circumstances, instruct the jury that the lease was the fruit of the insane delusion, for, notwithstanding such delusion, the lessor may have thought he was getting a good price for the lease, and may have made it on that ground, independently of his delusion. In other words, as we understand the case, it was held proper to leave the jury to draw their own conclusion whether the lease was the product of the insane delusion or not: *Jenkins v. Morris*, L. R. 14 Ch. Div. 674. We cannot ascertain that this question has been distinctly presented and decided in this country. It is certainly true that where an insane delusion exists of a character which may have affected the will, and caused the testator to disinherit his heir at law, that the latter cannot be required to prove that the testamentary disposition was the product of the de-

lusion: *Young v. Miller*, 145 Ind. 652. We judge the true rule upon this subject to be that upon the existence of the delusion being shown, and where, from it, the inference is reasonable that it did or might have dominated the testator in making his will, the question must be submitted to the jury, whether it did or did not, and that they should be instructed that their finding should be against the will, if they believe it to be the fruit of the insane delusion: *Edge v. Edge*, 38 N. J. Eq. 211; *Shaw's Will*, 2 Redf. 107; *Taylor v. Trich*, 165 Pa. St. 586; 44 Am. St. Rep. 679; and where the delusion is one obviously tending to pervert the testator's judgment as to the disposition of his estate, and to prejudice him against the natural objects of his bounty, and especially, where he is shown to have undergone a change in his feelings toward them upon becoming subject to the delusion, we believe the courts of this country incline to the view that his will cannot be sustained as a matter of law, or, at least, that a verdict in favor of it, in the absence of affirmative testimony tending to show that it may not have been the fruit of the delusion, will be set aside as contrary to the evidence: *Cotton v. Ulmer*, 45 Ala. 378; 6 Am. Rep. 703; *Brooke v. Townshend*, 7 Gill, 10; *Miller v. White*, 5 Redf. 320; *American Seamen's Soc. v. Hopper*, 33 N. Y. 624.

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## WOODWARD v. BROWN.

[119 CALIFORNIA, 283.]

**MORTGAGE—MORTGAGOR'S RIGHT TO HAVE THE WHOLE OF THE PROPERTY APPLIED SO AS TO BE RELIEVED FROM PERSONAL LIABILITY.**—The mortgaged premises constitute the primary fund out of which the mortgage debt is to be paid, and the mortgagee cannot arbitrarily release portions of the premises for less than their actual value without the consent of the mortgagor, and, if he does so, he must, on foreclosure, credit the mortgagor with the value of the premises released.

**MORTGAGE.**—The liability of a mortgagor under the laws of California is such that he cannot be compelled to pay any part of the mortgage debt until a decree has been entered for the sale of the premises, and the liability which even then exists against him is only to pay any deficiency which shall arise after a foreclosure sale. The mortgaged premises must be regarded as the principal debtor and the mortgagor as the surety, and his rights as surety should be preserved.

**MORTGAGE—MORTGAGOR'S RIGHTS WHEN HE HAS SOLD THE PROPERTY.**—Though a mortgagor has sold a part of the premises subject to the mortgage, covenanting in his conveyance that they were free from encumbrances, this does not authorize the mortgagee to release from his mortgage the part so sold and conveyed, and entitle him to a judgment for the mortgage debt without giving the mortgagor credit for the value of the property so released.

**MORTGAGE.**—Where parts of the realty subject to a mortgage are sold at different times, the decree in foreclosure should direct the sale of such parts in the inverse order of their alienation.

**NOTICE, REGISTRATION OF CONVEYANCE AS.**—The registration of a conveyance or encumbrance is constructive notice



only to subsequent purchasers and encumbrancers. One holding a mortgage on real property is not affected by subsequently recorded conveyances of parts thereof of which he had no actual notice.

**COVENANT, WHEN DOES NOT RUN WITH THE LAND.** The covenant implied in a deed of grant does not run with the land, nor impress it with any equity which will pass to the grantee. Hence, if the purchaser by a grant deed of land which is subject to a mortgage subsequently conveys it, his conveyance does not operate as an assignment to his grantee of any cause of action which he had against his grantor because of such mortgage.

**MORTGAGE.—A PARTIAL RELEASE** of a mortgage may be made, and, when made, it affects only the property therein described, and such release, whether upon the margin of the record or contained in a separate instrument, duly acknowledged and recorded, is sufficient to put persons dealing with the mortgaged premises upon inquiry.

**MORTGAGE, RELEASE, CONSTRUCTION OF.**—An instrument purporting to be made in consideration of fifty dollars, and declaring that certain parts of the mortgaged premises, describing them, are released from the lien of the mortgage, "together with the debt thereby secured is fully paid, transferred, and discharged," does not release the whole mortgage debt, but is restricted to the property described.

**JUDGMENT—AMENDMENT OF THE RECORD NUNC PRO TUNC IN SUPPORT OF.**—An affidavit of the service of summons may be amended two years after the entry of the default, so as to show that the person making the affidavit was qualified to serve the summons, and the order allowing such amendment may be made *ex parte*.

**PRACTICE—FINDINGS, WHEN SUFFICIENT.**—An issue as to whether the plaintiff is the real party in interest is sufficiently met by a finding that he is the owner and holder of the note sued upon.

**PRACTICE.**—In an affidavit for the service of summons it is not necessary to state that the sheriff has returned the summons. It is sufficient that the affidavit gives the names of the defendants and the names of the states in which each resides, and refers to the verified complaint and makes it a part of the affidavit.

**PRACTICE—AFFIDAVIT OF THE PUBLICATION OF SUMMONS, WHO MAY MAKE.**—An affidavit of the publication of summons sworn to by the publisher and proprietor of a newspaper satisfies the statute requiring it to be sworn to by the printer or his foreman or principal clerk.

**PRACTICE.**—An affidavit of the publication of summons, stating that the paper designated therein is a daily and weekly newspaper, that the summons has been published weekly in such newspaper, commencing on the seventeenth day of March and ending on the twenty-sixth day of July in each and every weekly issue of such newspaper published during such period of time, being the weekly issues thereof, sufficiently shows that the summons was published in the weekly editions of the paper consecutively for the period of more than two months.

**PROMISSORY NOTES. OPTION TO DECLARE DUE.**—The commencement of an action upon a promissory note is a sufficient exercise of the holder's option to declare it due for the non-payment of interest.

**MORTGAGE, ASSIGNMENT OF, DEALINGS WITH MORTGAGOR AFTERWARD.**—Payment to, and an agreement with, a mortgagee after his assignment of the mortgage, whether

for collateral security or not, cannot prejudice his assignee, who has recorded the assignment, and also has the note in his possession.

**EVIDENCE—BURDEN OF PROOF RESPECTING TIME OF DELIVERY OF DEEDS.**—If two conveyances are dated and acknowledged on the same day, but one is recorded three days before the other, one who claims that the latter conveyance was made before the other must assume the burden of proof.

**PRACTICE—AMENDED PLEADING—WHEN NEED NOT BE SERVED ON PARTIES IN DEFAULT.**—If, after some of the defendants have been in default, the plaintiff amends his complaint merely to the extent of setting out the indorsements on the notes sued upon, showing payments thereon, this is not an amendment in matter of substance, and therefore the amended complaint need not be served on the parties whose defaults had been previously entered.

**MORTGAGE—ASSIGNEE'S RIGHTS.**—In a suit by an assignee to foreclose the mortgage assigned to him, the court does not err in sustaining questions asked on cross-examination respecting the amounts paid for the assignment and when the assignee got an absolute title to the notes and mortgage sued upon.

**A SHERIFF'S DEED** takes effect by relation as of the date of the levy of the attachment upon which it was based, and if the land described therein is one of several parcels subject to a mortgage which is subsequently foreclosed, the rights and duties of the holder of the sheriff's deed must be regarded as if he had received his conveyance at the time of the attachment.

**FORECLOSURE, PARTIES TO.**—One who has purchased part of the mortgaged premises, and duly recorded his conveyance thereof, must be made a party to a subsequent suit of foreclosure.

**PRACTICE—FAILURE OF INTERESTED PARTIES TO APPEAL.**—Though in a foreclosure suit a party interested in the mode of sale and apparently prejudiced by the decree does not appeal, yet, if other parties appeal, the decree must be modified as to the nonappealing party in so far as may be necessary to protect the equity of the appellants.

**ATTORNEYS' FEE, COURTS MAY FIX WITHOUT EVIDENCE.**—Where a mortgage provides that in case of default, the mortgagee may foreclose, and shall be entitled to a reasonable counsel fee, to be fixed by the court, the court may fix the amount of such fee in the absence of any testimony upon the subject.

Robert L. Hargrove, for the appellants.

George E. Church and George B. Graham, for the respondent.

**288 THE COURT.** A petition for hearing in Bank having been granted, upon further consideration it appears that on January 20, 1892, McDonald conveyed to John Brown Colony, a corporation, and to D. S. Dorn blocks 51 and 60. On that day the title still remained in Brown. The Dorn deed was recorded January 23d, while the John Brown Colony deed was recorded January 26th. On January 25, 1892, Brown conveyed these same blocks to McDonald, the title thus inuring to Dorn, who first recorded his deed. The presumption of law relating to blocks 51 and 60 was correctly applied in holding in the former opinion that the Dorn deed was first delivered. But it

does not apply to the John Brown Colony deed as respects the other blocks and lots conveyed to that corporation. As to them, that deed must take date of January 20th, and therefore prior to the Dorn deed, and the Dorn block could not be released without crediting their full value upon the mortgage debt, as the mortgagee had actual knowledge of the John Brown Colony deed. The value of these blocks was found to be \$8,000. The mortgagee did in fact credit the mortgage debt with \$5,000 on account of the sale to Dorn, so that there remains to be credited the further sum of \$3,000, which should be done as of the date of the release of the Dorn blocks, March 1, 1892. We see no way to apportion this amount so as to exonerate the lots owned by the appealing defendants alone in the ratio that their lots bear to the whole number of lots sold by the John Brown Colony; nor do we see any way by which any principle of apportionment could be applied upon any basis of values. As the case stands, it is the fortune of the nonappealing defendants to share the benefits of this credit, as it would have been their misfortune had the dates of the conveyances to John Brown Colony and to Dorn been different.

In the matter of the petition by plaintiff for a modification of the opinion directing that Cecil Ricketts be made a party defendant, the petition will be granted in so far that should it appear that Ricketts had sold his lot prior to the commencement of the action to a person who was made a defendant, the direction heretofore given may be disregarded.

Wherefore, it is ordered and adjudged by this court in Bank that the judgment heretofore rendered in Department be modified <sup>289</sup> in the foregoing particulars, and that the judgment as modified stand approved.

Henshaw, J., concurred.

<sup>290</sup> The following is the opinion above referred to rendered in Department Two, November 1, 1897:

CHIPMAN, C. This is an action to foreclose a certain mortgage executed by John Brown, one of the defendants, to Thomas E. Hughes, another defendant, on September 28, 1889, to secure certain three promissory notes of even date with the mortgage, executed by Brown to Hughes, which said notes and mortgage were, on May 1, 1891, before maturity, assigned to plaintiff. The property mortgaged consisted of certain lots and blocks of Hughes' addition to the town of Madera, situated at the time in Fresno county, now Madera county, about one thou-



sand lots in all, many of which afterward fell into the ownership of divers persons who were made defendants as claiming some interest therein. Default was entered as to certain seventeen of the defendants, and certain five of the defendants, viz., Bank of Madera, Annie Lazar, John Brown, A. J. Etter, and N. Rosenthal, appeal. The pleadings cover five hundred folios, and present an exceedingly complicated array of facts out of which the issues arise.

It appears that mortgagor Brown conveyed block 65 March 17, 1891, before the assignment to plaintiff, and mortgagee Hughes released the same to Brown, consideration for sale being \$3,000, and for the release \$1,000. Brown also conveyed the east half of block 59 September 4, 1891, and the west half of block 59 October 8, 1891. This block was released by plaintiff September 4, 1891, consideration not shown. Brown also conveyed blocks 51 and 60 to McDonald, trustee, by deed dated January 20, 1892, and McDonald, by deed of same date, conveyed the same lots to one Dorn, consideration mentioned, \$10; released by plaintiff February 23, 1892, for consideration of \$5,000. All the remaining mortgaged premises were conveyed by Brown to McDonald, trustee, October 8, 1891, by grant deed; consideration stated was \$10. McDonald conveyed by grant deed to John Brown Colony, a corporation, January 20, 1892, the lots described in his deed of October 8, 1891, consideration mentioned, \$10. The colony corporation commenced selling lots January 21, 1892, and disposed of quite a number up to January 19, 1893, when it conveyed the remaining lots and blocks, still a large number, to the Madera Fruit and Land Company, a corporation. <sup>291</sup> This latter corporation sold several of the lots, when, on June 2, 1893, the remainder were attached at the suit of Bank of Madera, and it received sheriff's deed to the property of date March 12, 1895. Etter's deed is from John Brown Colony, dated February 23, 1892. Lazar's deed is from Madera Fruit and Land Company, dated May 27, 1893. Rosenthal's deed is from same company, and is dated June 3, 1893. Other facts will appear in connection with the various points raised by counsel.

As conclusions of law, the court found that plaintiff was entitled to the decree of the court for the sale of the premises not released and in the inverse order of the several conveyances thereof, and for deficiency judgment against Brown.

The decree was entered accordingly. The appeal is from the decree and from the order denying motion for new trial, and

from the order made May 9, 1896, striking out the affidavit of Robert L. Hargrove, served and filed in support of said motion for new trial.

1. The first question presented is as to the rights of the mortgagor Brown. It is claimed by him that under section 726 of the Code of Civil Procedure, and the decisions of this court touching that section, the mortgaged premises constitute the primary fund out of which the mortgage debt must be paid, and that the mortgagee cannot arbitrarily release portions of that fund for less than their actual value without the consent of the mortgagor, and, if he does so, he must on foreclosure credit the mortgage with the value of the portions released: Citing *Bartlett v. Cottle*, 63 Cal. 366; *Porter v. Muller*, 65 Cal. 512; *Bull v. Coe*, 77 Cal. 54; 11 Am. St. Rep. 235; *Barbieri v. Ramelli*, 84 Cal. 154.

Respondent treats this point as of little consequence, and makes but a mere passing allusion to it. Section 726 of the Code of Civil Procedure provides: "There can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. In such action, the court may by its judgment direct a sale of the encumbered property . . . and the application of the proceeds of the sale to the payment of the costs of the <sup>292</sup> court and the expenses of the sale, and the amount due to the plaintiff; and if it appears from the sheriff's return that the proceeds are insufficient and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt," etc.

The question presented is, not whether the mortgagee may release a portion of the property and look only to the residue, or may foreclose upon a part only and waive his security as to the residue, which he may do; but it is whether he may do this without the consent of the mortgagor and have a judgment docketed for a deficiency.

We cannot perceive upon what principle of equity or by what construction of this section it can be held that the mortgagee may, without the consent of the mortgagor, let go part of his security to a purchaser from the mortgagor, at less than its value it may be, and then look to the mortgagor to make up the deficiency. It would be a gross injustice to the mortgagor to hold him liable for a deficiency which the mortgagee has, without the mortgagor's authority or consent, created. The defi-

ciency which the code directs may take the form of a personal judgment is a deficiency arising from the sale of all the mortgaged security, and not a part of it: Jones on Mortgages, sec. 678a; Worcester Sav. Bank v. Thayer, 136 Mass. 459; Townsend Sav. Bank v. Munson, 47 Conn. 390.

The danger to the interests and rights of the mortgagor will at once be seen by supposing a not improbable case and one much like the one before us. The mortgagee, for reasons of his own, releases one after another of the mortgaged lots without consideration therefor or for a small consideration, thinking that he has retained enough out of which to realize on sale the amount of the debt. It turns out, through depreciation of values or other cause, that he miscalculated the value of his retained security and there was a deficiency after sale. Now there would have been no deficiency if he had not released a portion of his security. It would be clearly inequitable to hold the mortgagor in such case for any deficiency.

In Porter v. Muller, 65 Cal. 512, it was held that the proceeds of the sale of the mortgaged premises constitute the primary fund out of which the mortgaged debt must be paid. In Biddell v. <sup>293</sup> Brizzolara, 64 Cal. 354, it was said: "Whatever the form of the debt, the mortgagor can be legally compelled to pay no part of it until decree is entered for the sale of the premises mortgaged, and the liability which shall then accrue to him is a liability to pay only a deficiency which shall appear on the sheriff's return. The liability of the mortgagor is therefore contingent on the fact that a sale of the mortgaged premises shall satisfy the debt and costs." In Toby v. Oregon etc. R. Co., 98 Cal. 490, the language is: "The mortgagee must exhaust the property."

In Brown v. Willis, 67 Cal. 235, it was held that "a mortgagor cannot be compelled to pay any part of his mortgage debt until a decree is entered for a sale of the premises mortgaged." But if the mortgagee should release a part, he places himself in a position where he cannot sell all the premises. It is well settled that no deficiency can be entered up where a partial foreclosure takes place; it can only be done upon final sale of all the property. So long as any of the mortgaged premises remains unsold there can be no deficiency: Bull v. Coe, 77 Cal. 54; 11 Am. St. Rep. 235. See, also, Hall v. Arnott, 80 Cal. 348.

In Blumberg v. Birch, 99 Cal. 416, 37 Am. St. Rep. 67, it was held that, after sale of the mortgaged premises and there remaining a deficiency, action would lie to recover the amount,



although the deficiency judgment was void; but this was upon the assumption that the mortgage security had been exhausted by the foreclosure sale.

In *Barbieri v. Ramelli*, 84 Cal. 154, it was held that the mortgagee "was not authorized to waive the security and bring an action on the indebtedness, and the court erred in so holding, as it did in effect, and rendering judgment for plaintiff."

It seems to us that to allow the release of part of the security and to provide for a deficiency judgment, as was done in the case before us, would be a violation of the underlying principle of the case last cited, for the mortgagee would thus get a judgment which could be enforced against the mortgagor precisely as if the mortgagee had first waived his security and brought suit on the notes. If he can release part of the security, he can release all, and thus defeat the purpose of the law, which is to confine the mortgagee to the one action and to his security as <sup>294</sup> a primary fund. If it be said that, while he cannot waive all the security and then bring an action at law, he may waive part and foreclose on the residue and have his deficiency judgment, the answer is, that the law will not allow him to accomplish indirectly what he cannot do directly.

Numerous cases are cited in *Jones on Mortgages*, sections 722 and 981, to the effect that, as between the mortgagor and the mortgagee, the latter may release any portion of the mortgaged premises without affecting the lien upon the residue. But the cases cited by the learned author do not deal with the rights of the mortgagee to a deficiency judgment where he releases without the consent of the mortgagor, nor does it appear in those cases that the statute was as it is here. They deal with the mortgagee's right to foreclose on the unsold portion still in the hands of the mortgagor. Under our statute, on foreclosure, the land becomes the principal debtor and the mortgagor the surety, and his rights as surety should be preserved.

It may be that, in those jurisdictions where an action is given on the debt as well as on the security, the mortgagee may release regardless of the mortgagor's rights, or may proceed regardless of the security, but in this state the law gives him but one action, and he should be confined to that, at least to the extent of requiring him first to exhaust his security before obtaining other relief. If he desires to release a part of his security, and still hold the mortgagee for any deficiency after foreclosure, he must obtain the mortgagor's consent, or see to it that in releasing he is paid full value and gives the mortgagor credit therefor.

The form of deed from Brown to McDonald cannot affect the question. By it Brown's covenant was that the land was free from encumbrance, but this covenant was not such as is appurtenant to and runs with the land, under sections 1113 and 1460 of the Civil Code. It was a personal covenant: *Lawrence v. Montgomery*, 37 Cal. 183, and cases there cited. If the mortgage had been foreclosed upon all the property while Brown held the title, Brown would, of course, in any event, have been liable for a deficiency, and McDonald would have had his action against Brown upon the covenant. The right of the mortgagee to a deficiency judgment, however, would not arise from the <sup>295</sup> form of McDonald's deed, but from the mortgage and the statute, and from the fact that the mortgagee had not by his own act impaired his security in any manner. If he had released all of the lots but one to McDonald, without the knowledge or consent of the mortgagor, it would be unconscionable to hold that he could foreclose on the remaining lot and have his deficiency judgment against the mortgagor. The same reasoning already stated as to the effect of the releases given by the mortgagee to various subsequent purchasers from McDonald and their grantees would apply. The covenant of the mortgagor in his deed to McDonald is not available to the mortgagee, and is wholly unnecessary for his security; nor can it in any way give to the mortgagee upon foreclosure the right to a deficiency. It is unnecessary, because the mortgagee himself has a right to a deficiency judgment when his security is exhausted, and the covenant of the mortgagor in his deed would, if available to the mortgagee, give him no better remedy.

It was stipulated that the lots were of the market value of \$125 each. The plaintiff testified that it was the understanding with some of the parties, but with whom does not clearly appear, that he, plaintiff, would release for \$25 per lot; but later along, when the defendants opened their testimony, some stipulations were entered into by the respective counsel, and, among others, "it was stipulated that John Brown never consented to the release of any pieces of property from the mortgage." We think this stipulation is controlling as to the fact agreed upon by it.

The plaintiff testified that "there were 347 lots released at \$25 a lot." It also appeared that he released block 49 (in which there were 28 lots) to the Madera School District without any payment. A simple mathematical calculation will show that these lots were released for several thousand dollars less than

their agreed market value. If they had not been released, but had been included in the foreclosure proceedings, by no reasonable probability would there be any deficiency upon foreclosure. The decree, so far as it directs a deficiency to be entered against Brown, is erroneous, and should therefore be modified.

2. The next question presented is whether the court erred in <sup>290</sup> directing the sale of the lots in the inverse order of their alienation. We do not understand from appellant's brief that the correctness of the rule is questioned in a case like the present one. There can be no doubt but that this is the rule in this state: Civ. Code, secs. 2899, 3433. See, also, *Kent v. Williams*, 114 Cal. 537. But, as we understand appellants' position, it is that the rule requiring sale in the inverse order of alienation was, in certain cases involved, changed by the act of the mortgagee, and this contention will next be noticed.

3. The question most discussed by appellants is as to the equities of subsequent purchasers as they are affected by the releases made by the plaintiff of certain of the mortgaged lots, which had been sold by the mortgagor after plaintiff acquired the mortgage, and were resold by the mortgagor's grantee and again and again resold by subsequent grantees. A large number of cases are cited by appellants illustrating the rights of purchasers from the mortgagor and their grantees as affected by releases made by the mortgagee. But none of them will be found to hold that the mortgagee may not release without liability to him or impairment of his remaining security, where he does so without actual knowledge of the conveyance. As his mortgage is a lien, and creates an encumbrance alike upon all parts of the land subject to it, no subsequent change in the ownership of the mortgaged premises of which he is ignorant can in any degree limit his original rights conferred by the security. The record of subsequent conveyances is not a constructive notice to the prior mortgagee, so as to prevent him from dealing in any manner with the mortgaged premises; he must have actual notice.

The cases supporting the foregoing are numerous and will be found cited in 2 Pomeroy's Equity Jurisprudence, secs. 656, 657; 3 Pomeroy's Equity Jurisprudence, secs. 1224-1226; 2 Jones on Mortgages, secs. 1621-1624; 1 Jones on Mortgages, secs. 722, 723. As to the rights of the mortgagor, who had conveyed all the mortgaged premises, they are in nowise affected by these releases, except as to the single question of plaintiff's right to a deficiency judgment, and this has already been disposed of.



The only other defendants appealing are Etter, Rosenthal, Lazar, and Bank of Madera, and, as to them, it follows that unless <sup>297</sup> plaintiff had notice of their deeds his releases to certain other purchasers, whether given before or after defendants' deeds, afford them no ground of complaint, and the utmost that can be claimed by them is that the foreclosure sale should proceed in the proper order.

The court found that plaintiff had no notice or knowledge of defendants' deed, and, the evidence upon that point being in conflict, this finding cannot be disturbed. It may be said that, inasmuch as Brown's deed to McDonald implied a covenant of warranty that no encumbrance rested on the premises, an equity thus attached in favor of McDonald which passed to his grantees and purchasers from or through them.

But the covenant in Brown's deed to McDonald was personal between him and Brown, and was not a covenant running with the land, and impressed it with no such equity as would pass with the land conveyed by McDonald or his grantee. McDonald, by his grant deed, covenanted against his own acts in creating encumbrances, but not against those of his grantor, the mortgagor. McDonald's grantee took the land subject to the Brown mortgage without any agreement, express or implied, that McDonald would pay the mortgage debt; nor did McDonald's deed operate as an assignment to his grantee of the right of action which McDonald had against Brown on the implied covenant: *Lawrence v. Montgomery*, 37 Cal. 183.

4. Defendants make the point that there is no provision in our code for partial or other releases; that the only provision relates to a full satisfaction, and that the partial satisfactions or releases operated to discharge the mortgage lien: Citing Civ. Code, sec. 2938. We do not think there can be any doubt but that partial releases are authorized by this and subsequent sections. Whether so or not, the universal practice of making partial releases, and their obvious convenience and importance to all persons having any interest in the mortgaged premises, would warrant us in upholding and limiting them to the purpose expressed in making them. It certainly cannot be claimed that if a partial release is unauthorized that when made it would nevertheless operate to discharge the whole mortgage lien.

The section referred to does not provide in terms for partial satisfactions on the margin of the mortgage record or otherwise, <sup>298</sup> but as the partial releases in this case were either upon the margin of the record of the mortgage or in separate instru-

ments duly acknowledged and recorded, we think this would impart notice or be sufficient to put a person dealing with the mortgaged property upon inquiry, which, if pursued, would easily lead to the discovery of the fact.

Defendants claim that there was one particular release made by plaintiff which had the effect to completely satisfy and discharge the mortgage. It is as follows:

“O. J. Woodward, Assignee, to John Brown.

“Dated November 11, 1893.

“Consideration \$50.

“That the following land situate in county of Madera, state of California, described as follows, to wit, lots 6 and 7 in block 67 of Hughes' addition to the town of Madera . . . hereby released from the lien of the mortgage, made by John Brown Colony to Thomas E. Hughes, and recorded, etc., . . . together with the debt thereby secured, is fully paid, satisfied and discharged.

(Signed) O. J. WOODWARD,

“Assignee.

“Acknowledged in due form Nov. 11, 1893, and duly recorded.”

That portion of this document reading “together with the debt thereby secured, is fully paid, satisfied, and discharged,” does not appear as part of the record evidence. At folio 793 it appears as defendants' exhibit 37 without the paragraph above quoted. In an affidavit made by one of defendants' attorneys, sworn to March 5, 1896, and served on plaintiff's attorney March 7th and filed March 10, 1896, this release is set out with the paragraph above quoted contained in it, and this alleged new matter, among other things, is stated in support of the motion for a new trial. The notice of this motion was served and filed February 29, 1896, and stated, among other things, that the motion would be heard “upon affidavits hereafter to be served.” At the hearing, May 9, 1896, this affidavit was, on motion of plaintiff's counsel, stricken from the records, to which defendants' counsel excepted. I think it evident from the release itself, in whichever form it is to be considered, that it was not the intention <sup>299</sup> of the mortgagee thereby to release the entire debt, and that it should not be extended beyond its intention. The consideration paid for the release was \$50, and this was indorsed on one of the notes the same day as follows: “Nov. 11, 1893, lots 6 and 7, block 67, \$50,” and on the mortgage was indorsed the following: “Nov. 11, '93, lots 6 and 7, block 67 (release sent to Madera).” Defendants were not misled by it, for it was not

made until after they had purchased. The case of *Beal v. Stevens*, 72 Cal. 451, cited by defendants, in nowise conflicts with this view.

5. There were other matters set forth in this expurgated affidavit, and defendants claim error in striking it out as to these matters as well. It is quite lengthy, and need not be set forth in this opinion.

This affidavit is before us as part of the bill of exceptions. It was filed on March 10, 1896, and the motion for a new trial came up on May 9th following. The matters contained in it were mainly recitals of what appeared in the record, and were more in the nature of an argument on the motion than the presentation of any new fact of which the court could take notice. It was not presented by way of suggesting diminution of the record, nor was it in support of the ground of newly discovered evidence, for that was not made a ground in the motion. All the points presented in the affidavit are made in the briefs of counsel for the defendants, and do not require its aid for their full determination which is given them in this opinion. I cannot see that they were prejudiced by striking it out.

6. Defendants assign as error that the court allowed the affidavit of personal service of summons on certain defendants made September 15, 1894, to be amended and filed September 15, 1896, *nunc pro tunc*. The particular in which the amendment was made was in stating that affiant was, at the time he served the summons, over the age of eighteen years, which by inadvertence he omitted to state. The objection made was, that the court could not, after judgment entered, allow the affidavit to be amended, and that the defaults entered were unauthorized. The order was *ex parte* and directed that the amended affidavit be made part of the judgment roll. In *Herman v. Santee*, 103 Cal. 519, 42 Am. St. Rep. 145, it was held that this might be <sup>300</sup> done, but in that case opposing counsel was present in court and had a hearing on the motion, although not previously notified. I cannot see, however, but that the reasoning in that case and the authorities cited in it would allow such an amendment *ex parte*, and without notice, although such practice is not to be commended. In such event, the party claiming to be injured could afterward appear and move to set aside and vacate the order, and such a motion should be granted upon a showing that the amendment was not true in fact. Whether, however, the motion here was of such character as to require previous notice need not be determined, for defendants had subsequent



notice and full opportunity to take steps to have the truth of the matter ascertained and cause the order to be vacated if erroneously entered. They filed an affidavit calling attention to the amended affidavit, and objected to the return of the summons with the amended affidavits, claiming them to be insufficient, but did not controvert any fact stated in them, and defendants did not ask to have the order entered *nunc pro tunc* vacated for any reason.

7. Defendants assign as error that plaintiff is not the real party in interest and has no right to prosecute the action, and that this issue is raised by the pleadings, and the court did not find upon this issue. The court found that plaintiff was the owner and holder of the notes and mortgage when the action was brought, and the evidence shows he took them by written and recorded assignment May 1, 1891. There is some evidence tending to show that he originally took them while acting for the First National Bank of Fresno, of which he was president, but he testified that he finally bought them outright. The written assignment of Thomas E. Hughes (mortgagee), dated February 12, 1893, to W. M. Hughes of all his right to the notes and mortgage is in evidence, and in it he recites that the notes and mortgage are held by O. J. Woodward (plaintiff) and the First National Bank as collateral security for his indebtedness to them. It does not appear that plaintiff had knowledge of this assignment, and even if he had, his assignor could not bind him by recitals in an assignment to another assignee. The finding is justified by the evidence, and substantially finds on the issue raised by defendants' answer.

8. Defendants claim that the affidavit for the order of publication <sup>301</sup> of summons is void, as not in compliance with section 412 of the Code of Civil Procedure. The affidavit gives the names of the defendants and states that they resided without the state, and names the state in which each resides; it refers to the verified complaint and makes it a part of the affidavit, and states that the defendants are proper and necessary parties to the action; that affiant has a good cause of action against the defendants, as he is advised by his counsel and verily believes. The complaint states a good cause of action. It was not necessary to state that the sheriff had returned the summons, and it is immaterial whether the summons had been returned when the affidavit was made. I see no defect in the affidavit.

9. It is further objected that the affidavit of publication is

void because it does not state that affiant was the foreman, printer, or principal clerk, and does not state that the summons was published once a week, nor the length of time published: Citing Code Civ. Proc., sec. 415. The affidavit was sworn to by the publisher and proprietor of the paper. The code, *supra*, says the proof must be made by the "printer, or his foreman or principal clerk." It was held under the practice act, where the word "printer" is used, that the word "proprietor" is, in the sense of the statute, synonymous with "printer": *Quivey v. Porter*, 37 Cal. 458. There is nothing in this point. The affidavit states that the "Madera Tribune" is a daily and weekly newspaper, "and that the summons, of which the annexed is a true and correct printed copy, has been published weekly in the said newspaper, commencing on the seventeenth day of May, A. D. 1894, and ending on the twenty-sixth day of July, A. D. 1894, inclusive, in each and every one of the consecutive weekly issues of said newspaper issued during said period of time, being the regular weekly issues thereof." Some doubt might arise as to which one of the papers, the daily or weekly, is referred to by the terms "said newspaper," whether the subject referred to was the daily or the weekly. The affidavit shows further on that the paper referred to was the "regular weekly issue." It does not appear on what day of the week the weekly paper is published, but the affidavit says the publication began on the 17th and was published weekly. The time stated would give twenty insertions and embrace seventy days. I think the <sup>302</sup> affidavit shows a sufficient length of time and that the publication was once a week.

9. Defendants also complain of the application made of the several payments; that they should have been credited first on the three year note, second on the four year note, and third on the five year note, and that if they had been so applied there would have been nothing due on December 19, 1893, when the action was commenced: Citing Civ. Code, sec. 1479.

It appears from the evidence that the first note, due in three years, to wit, on September 28, 1892, was paid in full at maturity. The second note fell due September 28, 1893, and this action was brought December 19, 1893. There is no evidence as to plaintiff's exercise of his option to regard the unpaid notes as due, which by their terms was given, except the bringing of the action. It is in evidence that no payments were made to plaintiff except such as were indorsed on the notes. When the suit was brought the second note was past due, and if all the

payments made after the first note was paid had been indorsed upon the second note, instead of being indorsed partly on it and partly on the last note as was done, there would still have been an unpaid balance on the second note. The notes bore the same rate of interest, and defendants were not injured by the alleged misapplication of the payments. The last note became due on December 19, 1893, by the commencement of the action, and it was not necessary to the exercise of the option to regard it as due that previous notice should have been given to Brown or Hughes, for there was still due some unpaid interest on both notes and some unpaid principal on the second note, and besides, the beginning of the action operated as an exercise of the option: *Hewitt v. Dean*, 91 Cal. 5.

10. Defendant Etter purchased from the John Brown Colony, February 23, 1892, and his lots have not been released. He sets up a defense special to himself, to wit, that Hughes, the mortgagee, on November 26, 1892, received from him \$325 on lots 7, 8, 9, and 10 of block 28, and agreed to release the lots from the mortgage and "hold him harmless and secure in the title to said lots." The agreement was in writing and is in evidence. This was nine months after he had purchased and obtained a deed, and one year and seven months after the notes and the mortgage <sup>303</sup> were assigned to plaintiff; there is no evidence that plaintiff received this money, or had any knowledge of its payment to Hughes, and in his answer Etter does not allege knowledge in plaintiff, but claims that Hughes was and is the real owner of the mortgage, and that it was simply pledged with plaintiff to secure payment of Hughes' indebtedness to plaintiff. Clearly, without proof of knowledge of this agreement or consent thereto, implied or otherwise, by plaintiff, it cannot bind plaintiff and is no defense. Even if Hughes was the real owner of the mortgage, and plaintiff held it and the notes as security only, Hughes could not bind plaintiff by any such agreement without his knowledge or consent, and there is no evidence that he had any knowledge until the answer was filed. Section 1487 of the Civil Code and the case of *Mahler v. Newbauer*, 32 Cal. 168, 91 Am. Dec. 571, cited by defendants, do not conflict with this view. Defendants cite numerous authorities, among them *Jones on Mortgages*, section 479, to the effect that the record of assignment of a mortgage is not constructive notice of it to the mortgagor so as to make invalid a payment made by him to the mortgagee. But that author also says in the same section that the record of assignment of



the mortgage is part of the record title of which a purchaser of the equity of redemption must take notice. I do not think any case can be found holding that a payment, by a purchaser, of part of the mortgaged premises, to a mortgagee who had previously assigned both notes and mortgage, and the assignee had recorded his assignment and had possession of the notes when payment was made, would be good against the assignee of the mortgage who had not consented thereto. The cases cited are not in point.

11. A question arises as to the effect of the sale of blocks 51 and 60 by McDonald to Dorn on January 20, 1892, on which day McDonald conveyed the residue of the mortgaged premises (except block 65, previously sold and released) to John Brown Colony, a corporation. The Dorn blocks were released February 23, 1892, by plaintiff. Brown conveyed the property to McDonald October 8, 1891, by grant deed, burdened with the debt as it stood when Brown conveyed. It is conceded by plaintiff's counsel that if the conveyance to John Brown Colony had been made and delivered before the conveyance to Dorn, and plaintiff <sup>304</sup> had actual knowledge of that fact at the time he released these blocks, plaintiff would have been compelled to credit his mortgage notes with their market value in case of the parcels conveyed to John Brown Colony, which was found to be \$8,000, whereas he released for a payment of \$5,000. But plaintiff contends that the burden is on the defendants to show these facts, and that neither of the facts existed. The court found that plaintiff had knowledge of both of these deeds when he released these blocks. They bear the same date and were acknowledged the same day, but the Dorn deed was recorded January 23d, while the John Brown Colony deed was recorded January 26th. The \$5,000 payment was credited on the notes. There is no evidence beyond the foregoing tending to show which one of these deeds in point of fact was first delivered. We think that the burden was upon defendants to show that these blocks were conveyed to Dorn after the conveyance to John Brown Colony, and, not having done so, we must presume that the evidence supported the judgment and that the colony deed followed the Dorn deed. As, therefore, the John Brown Colony lands were first liable, that corporation could not and does not complain of the release to Dorn. Brown cannot complain if no deficiency is allowed against him, and the other defendants cannot complain because their deeds were subsequent

to the John Brown Colony deed, and plaintiff had no knowledge of them.

12. It is also claimed that the amended complaint was filed, after order of publication of summons, and was not served by republication of summons, nor was it served on any of the defendants, except R. H. McDonald and W. S. Chapman. *Thompson v. Johnson*, 60 Cal. 292, and section 472 of the Code of Civil Procedure are cited. It was held in *Thompson v. Johnson*, 60 Cal. 292, that, where a plaintiff amends in matter of substance, he, in effect, opens the default on the original pleading, and must serve his amended pleading upon the parties, including the defaulting defendant.

The amendment here was not such matter of substance as would bring the case within the rule above laid down. The complaint alleged the amount due on the notes, and that plaintiff had exercised his option to regard the notes as due. The <sup>305</sup> amendment simply set out the indorsements of payments on the notes, from which it could be ascertained just what appeared in the complaint; it was somewhat in the nature of a bill of particulars. The only other allegation was as to the option, and that appeared in the original complaint. There is no merit in this point.

13. Defendants objected to pretty nearly all the evidence introduced by plaintiff, in chief, but I find no alleged error meriting notice. On cross-examination of plaintiff, when on the witness stand, he was asked how much was due on the mortgage and how much he paid for the mortgage; to the latter question plaintiff's counsel objected, and the court sustained the objection, very properly, I think. It was immaterial what he paid.

He was asked on cross-examination if there was anything owing to the First National Bank above what it paid for the mortgage. The plaintiff objected as immaterial and irrelevant, and the court refused the question. I cannot see wherein defendants were injured by this refusal. Nor, later on, when the court refused defendant's question as to whether the witness had any interest in the suit. He had testified that there was due him a certain amount on the notes, and, while the question was not an improper one, I cannot see that the answer, whatever it might have been, would change the result. For the purpose of bringing the action, his possession of the notes and mortgage, even if he had held them for collection, would have been sufficient to sustain his right of action, and later on,

in answer to defendant's question, he testified that he "bought the mortgage right out."

It was also immaterial when he got absolute title, and a question as to the time was immaterial, and so also was it immaterial whether he advanced other money upon the mortgage than the amount he had testified to. The court might well have allowed more freedom of cross-examination, but it appears that the defendants were not prejudiced in their substantial rights by any restriction imposed by the court. These alleged errors are not urged in defendants' brief.

14. Defendants complain that W. E. Johns, a defendant, was a purchaser from Madera Fruit and Land Company subsequent to the Bank of Madera title; that he was not served with summons and did not appear, but that the court ordered the property <sup>308</sup> of the Madera Bank to be sold before the sale of Johns' lots. The evidence shows that Madera Fruit and Land Company sold to Johns, July 13, 1893, block 73 for \$4,000, and the deed was recorded July 14, 1893. The Bank of Madera took its deed from the sheriff, dated March 12th, acknowledged April 9th, and recorded April 10, 1895. The writ in the attachment suit, under which the sale was finally made, was levied June 2d, and a copy recorded June 3, 1893, and the sheriff's deed took effect, by relation, from the levy of attachment: *Porter v. Pico*, 55 Cal. 165; *Jones on Mortgages*, sec. 1623. No question is raised as to the validity of the attachment. Jones was personally served, as shown by the affidavits of service, and his default was entered. This conveyance of the Johns' block apparently was the last one affecting the property. The order directs the sale of: 1. The lands held by the Madera Fruit and Land Company; 2. The lands of Bank of Madera; 3. The residue in the inverse order of alienation as shown by the recordation of the various deeds, to wit: (a) The parcels conveyed by the Madera Fruit and Land Company in the inverse order of the deeds; (b) The parcels conveyed by the John Brown Colony in like order; (c) The parcels conveyed by John Brown in like order. I find, in tabulating these various deeds and the order of sale prescribed in the decree, that Johns' block is the thirty-third parcel or groups of parcels ordered sold. The previous parcels ordered sold belonged to Madera Fruit and Land Company and Bank of Madera. The Madera Fruit and Land Company took by deed dated January 19, 1893; the Bank of Madera (through its attachment) as of June 3, 1893. If the sheriff's deed is to be given effect as of



date June 3, 1893 (date of attachment), it was error to decree the sale of the Bank of Madera lots before selling the Johns' block. That it must be so treated is beyond question. If the Madera Fruit and Land Company had sold to the Bank of Madera on June 3d, and afterward on July 13th had sold to Johns other of the mortgaged lands, clearly Johns' land should be first sold, and I can see no difference arising, in these relative rights, from the fact that the title of the bank came through the attachment. The lien attached June 3d, and if that lien is to have any value it must be held to be good as against Johns. He had constructive notice of it, and should be charged with constructive <sup>307</sup> notice of all the consequences to flow from it. The defendant, Bank of Madera, is directly and may be injuriously affected by this order of sale. The learned judge who tried the case evidently treated the sheriff's deed as the inception of this defendant's rights, as he found that the bank became the owner March 12, 1895, and, if that had been the fact, the decree to sell Johns' land last would not have injured the bank; but it was not the fact.

15. The decree directs the sale of lot 23, block 28, toward the last of the parcels to be offered. It was embraced in the mortgage, and was conveyed by Brown to McDonald, and by him to the John Brown Colony, and by the colony to the Madera Fruit and Land Company, and by that company to Cecil Ricketts by deed dated January 26, 1893, recorded March 25, 1893. He was not made a defendant and does not appear, and his lot has not been released. There is no finding of the court as to the then owner of this lot. To order its sale was clearly error. He was a necessary party in adjusting the equities of the various purchasers, as much so as numerous others who were brought into court: *Porter v. Muller*, 65 Cal. 512.

16. Lot 4, block 64, is among the earlier parcels ordered sold. Title is in Madera Fruit and Land Company. The remaining lots in the block come later in order of sale. Title is found by the court to be in Bank of Madera of the whole block, except lot 4. The sheriff's deed to the bank describes lots 1 to 3, 5 to 6, and 22 to 32. The deed from Brown to McDonald conveyed the whole block; McDonald conveyed the whole block to John Brown Colony, and the John Brown Colony conveyed to the Madera Fruit and Land Company, through which Bank of Madera takes title only to lots 4 to 14 and 25 to 32. This chain of title leaves lots 1 to 3 and lots 15 to 24 in John Brown Colony, and this would necessarily change the order of the sale. I can

find in the record no releases and no conveyances of these lots 1 to 3 and 15 to 24, except as above shown. The mortgage describes all of block 64.

The decree orders these lots sold as belonging to Bank of Madera, and makes no provision for the sale of any lots belonging to the John Brown Colony, assuming, I suppose, that there were none. So far as the John Brown Colony is concerned, not having <sup>308</sup> appealed it cannot be heard to complain of the order in which sales were directed to be made, but the sale of its lands which remain subject to the mortgage must, with reference to other defendants, and especially as to those appealing be made with due regard for their equities.

I find no mortgage lots still in John Brown, and no lots still in McDonald, or any immediate grantee of Brown, or in the grantee of any grantee of Brown, which have not been released. If there should be any held by his grantees, the decree properly places them last in order of sale, being first alienated.

17. The court found that lots 1 to 6 and 26 to 32, in block 28, belonged to Bank of Madera, and these lots are ordered sold as its property, with other of its lots. The record shows that the Madera Fruit and Land Company sold lots 26 to 32 in this block to W. E. Davis, by deed recorded July 14, 1893. There is no evidence of any transfer by Davis or of any release of the lots. Davis appeared by his attorney and notice of the appeal was served upon said attorney, but Davis does not appeal. There are several similar transfers. The interest of such grantees should be sold before that of the Bank of Madera because its deed relates back to June 3, 1893.

18. It is claimed that the sixteenth finding (fourteenth intended) is not sustained by the evidence, in this, that the evidence shows that Bank of Madera is owner of the west half of block 59 and is not mentioned in the finding, and that Bank of Madera is not the owner of lots 27 and 28, block 53, mentioned in said finding. The court found that all of block 59 was released September 4, 1891. The west half of block 59 came by mesne conveyances into Madera Fruit and Land Company, and was part of the property attached.

John Brown sold to one Boyd lots 1 to 14 of this block September 1, 1891, and the west half of the block October 8, 1891, to McDonald, and McDonald conveyed to Madera Fruit and Land Company. The mortgage that was introduced in evidence showed an indorsement as follows: "Released by O. J. W., September 4, 1891, block 59." Plaintiff alleges the re-

lease of the whole block September 4, 1891, and this is not denied; on the contrary, defendant Bank of Madera sets out in its answer the date of the release and that it was indorsed on the margin of the <sup>309</sup> mortgage in the record of mortgages. The evidence justifies the finding as to this block.

Lots 27 and 28, block 53, appear by the evidence to belong to the Madera Fruit and Land Company, and should be sold before the lots of the Bank of Madera are sold.

19. The twentieth finding is attacked on the ground that the attorney of plaintiff is not shown to be entitled to any sum as attorney fees. The mortgage provided that in case of default, etc., "the mortgagee may foreclose the mortgage, and may include in such foreclosure a reasonable counsel fee to be fixed by the court," etc. There was an allegation in the complaint that the sum of \$1,000 is a reasonable sum as attorney's fees for the prosecution of the action. This was denied. There is no evidence as to employment or value of the services. The court found the sum of \$750 to be a reasonable sum to be allowed, and it was carried into the decree. The attorney brought the action and tried it and this appears from the record; no further evidence of employment was required. The duty of fixing the amount of compensation was cast upon the court, and no evidence of value of the services was necessary: Stats. 1873-74, p. 707; *Carriere v. Minturn*, 5 Cal. 435; *Monroe v. Fohl*, 72 Cal. 571; *First Nat. Bank v. Holt*, 87 Cal. 158; *White v. Allatt*, 87 Cal. 245.

The decree should be modified in the following particulars: 1. The lots belonging to W. E. Johns should be sold before the lots belonging to the Bank of Madera are offered; 2. Lots 1 to 3 and 15 to 24, block 64, should be sold before the lots of Madera Fruit and Land Company; 3. Lots 27 and 28, block 53, should be sold among other of the lots belonging to the Madera Fruit and Land Company; 4. The Bank of Madera deed must take date of June 3, 1893, and the order of sales be directed with reference to that date, as in the case of W. E. Davis and other like it; 5. The provision of the decree for deficiency judgment should be stricken out; 6. Before further proceedings are had Cecil Ricketts should be made a party defendant, by due service of process, with the right to answer and litigate any issues properly raised by him; and should there be found other grantees of the mortgaged premises, not defendants, whose deeds were recorded prior to the commencement of the action, and who are



necessary <sup>310</sup> parties, leave should be given to bring them in also on like terms.

The deed of the lots to Ricketts was dated January 26, 1893, but Rosenthal's and Lazar's deeds were made subsequently, so that as to these two defendants their lots should be sold before Ricketts', and his appearance cannot affect them. As to Etter, however, his deed antedates Ricketts', and Etter's lots should not be sold until after Ricketts' is sold. The defendants who have appealed should be allowed to be heard upon all issues raised by any new defendant in any way injuriously affecting them. But I see no reason for reopening the whole case and granting a new trial, for it appears that only one defendant can be affected by the appearance of Ricketts, and he only as to the order in which sale should be made. In view of the fact that at least one other person must be made a party, it becomes impracticable for us to point out the precise order in which all the various parcels must ultimately be sold. The principle adopted by the learned judge who tried the case is the correct one, as the facts now stand. If no new fact should appear, upon a further hearing, affecting the rule as in this opinion set forth, the sales should take place finally by first exhausting the property (if there be any) of the mortgagor and of McDonald and of the John Brown Colony in the order named, and then by sale of the residue in the inverse order of the various alienations as shown by the recordation of the various deeds—placing the last lots of the residue, to which there is a recorded deed, first in order of sale and so on to the first lots sold—treating the deed of the Bank of Madera as of June 3, 1893.

It is recommended that the case be remanded for further proceedings in accordance with this opinion, the costs of this appeal to be allowed to the appealing defendants.

Searls, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion it is ordered that the case be remanded for further proceedings in accordance therewith, the costs of this appeal to be allowed to the appealing defendants.

McFarland, J., Temple, J., Henshaw, J.

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**MORTGAGE--FORECLOSURE--ORDER OF SALE.**—If a sale is made of pieces of land subject to a mortgage, they are liable for the encumbrance in an order inverse to that of their alienation: *Turner v. Flenniken*, 164 Pa. St. 469; 44 Am. St. Rep. 624, and note; *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211; 43 Am. St. Rep. 491.

**MORTGAGE—FORECLOSURE SUIT—PROPER PARTIES.**—All persons claiming an interest in mortgaged premises are proper, if not necessary, parties to a suit in foreclosure: *O'Brien v. Moffitt*, 133 Ind. 660; 36 Am. St. Rep. 566, and note.

**MORTGAGE—ASSIGNMENT OF—RIGHTS OF ASSIGNEE.**—The assignee of a mortgage and accompanying negotiable instrument, transferred before maturity and for a valuable consideration, takes the securities free from any equities existing between the original parties of which he had no notice: *Williams v. Keyes*, 90 Mich. 290; 30 Am. St. Rep. 438, and note; *Wilson v. Ott*, 173 Pa. St. 253; 51 Am. St. Rep. 767; *Curtis v. Moore*, 152 N. Y. 159; 57 Am. St. Rep. 506. Acts and declarations of the assignor of a chose in action, made subsequent to the assignment, are not binding upon the assignee: *Kimball v. Huntington*, 10 Wend. 675; 25 Am. Dec. 590.

**DEEDS—RECORDING OF, AS CONSTRUCTIVE NOTICE.**—The doctrine that the record of a deed is constructive notice applies only against subsequent purchasers and encumbrancers: *Karns v. Olney*, 80 Cal. 90; 13 Am. St. Rep. 101; *Holley v. Hawley*, 39 Vt. 525; 94 Am. Dec. 350. See note to *Ætna Life Ins. Co. v. Hesser*, 14 Am. St. Rep. 302, 303.

**EXECUTION—SHERIFF'S DEED—EFFECT OF BY RELATION:** See *Jackson v. Ramsay*, 15 Am. Dec. 248-251; *Rogers v. Brent*, 5 Gilm. 573; 50 Am. Dec. 422. See *Chalfin v. Malone*, 9 B. Mon. 496; 50 Am. Dec. 525.

**PROCESS—SERVICE BY PUBLICATION—AFFIDAVIT.**—Service by publication may be proved by the affidavit of the bookkeeper of the newspaper company publishing it, or by the affidavit of any other person having actual knowledge of the facts, and such proof is sufficient on collateral attack: *Taylor v. Coots*, 32 Neb. 30; 29 Am. St. Rep. 426, and note. For instances of defective affidavits, see *Frisk v. Reigelman*, 75 Wis. 499; 17 Am. St. Rep. 198; *Godfrey v. Valentine*, 39 Minn. 336; 12 Am. St. Rep. 657.

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## PESHINE v. ORD.

[119 CALIFORNIA, 311.]

**MORTGAGE, PRESCRIPTIVE TITLE IN FAVOR OF MORTGAGEE AND AGAINST A MORTGAGOR.**—If the mortgagee, to the knowledge of the mortgagor, denies that there is any mortgage, and asserts title in himself and otherwise manifests an adverse holding, the mortgagor and those claiming under him must proceed within five years or lose all remedy, whether the debt or obligation secured by the mortgage has been paid or not.

**AFTER A MORTGAGOR'S TITLE HAS BEEN DIVESTED,** thenceforward his acts are those of a stranger to the premises, and can neither prejudice nor assist his grantee or successor in interest.

Richards & Carrier, for the appellants.

Wright & Day, for the respondent.

**312 THE COURT.** Action to quiet title to a portion of a certain lot No. 97, outside lands of the town of Santa Barbara.

On January 29, 1875, James L. Ord, then the owner of said lot 97, executed a deed purporting to convey the whole thereof to one Robert B. Ord, his brother, for the expressed consideration of fifteen hundred dollars. On August 20, 1875, in an action of divorce between said James and his wife, Augustias de la Guerra de Ord, the former district court rendered a decree whereby, in terms, a tract of eighteen acres off the west side of said lot—approximately one-half of the same—was apportioned and set over to the wife. Plaintiff is the daughter of said James and Augustias, and whatever title to the land was acquired by Augustias in virtue of said decree passed by her deed of gift, made June 1, 1878, to the plaintiff, who was then of full age. The present action was begun on December 8, 1891. Plaintiff claims that the deed of January 29, 1875, by James to Robert Ord, was intended to operate as a mortgage only; that the obligation secured thereby was discharged, and hence that the title she derails through her mother is valid against the defendants, who are the heirs at law of said Robert. Defendants deny these pretensions of the plaintiff, and plead also the statutory limitations—five years—prescribed for actions to recover real property, or to redeem from a mortgagee thereof in possession: Code Civ. Proc., secs. 318, 319, 346. All the issues were found in plaintiff's favor by the court below.

It is alleged by plaintiff that the deed of January 29, 1875, was made to secure the payment of money, and the finding of the court was similar; it was not alleged nor found what amount was thus secured, nor when it was payable, nor to whom; but it seems to have been the theory of the case made for plaintiff that Robert Ord became security on the note of James Ord to a certain bank, payable June 26, 1875, and that James made said deed to indemnify Robert against loss from such relation of suretyship; that Robert paid the note, and afterward received funds of James sufficient for his reimbursement. Much vagueness permeates the plaintiff's case, though possibly the findings and judgment should not fall on this account alone: *Cline v. Robbins*, 112 Cal. 581.

<sup>313</sup> Subsequently to the decree of August 20, 1875, by which, plaintiff alleges, title to the tract in suit passed from James Ord, said James made to Robert Ord other conveyances of land in the same vicinity, all absolute in form, but claimed now by James to have been executed by way of mortgage or else in trust to be managed and controlled by Robert for the benefit of James to pay the latter's debts and for other purposes.



Some of the lands included in these transactions were retransferred by Robert to James in 1876; the residue, together with the parcel in controversy here, continued in Robert's possession. In the month of October, 1886, as appeared from the evidence for plaintiff, James demanded of Robert a reconveyance of the property, and thereupon Robert repudiated and disavowed any fiduciary relations with James and refused to account for the profits of the land, and refused to convey any portion thereof remaining in his possession. On September 22, 1887, James instituted a suit against his brother for an accounting and to enforce a reconveyance of the property; pending which action, on October 20, 1889, Robert died. On June 28, 1890, a compromise of the suit was agreed upon in writing between James and the representatives of said deceased, with the approval of the defendants here, and in February, 1891, a judgment was entered disposing of the case accordingly. By the terms of such written agreement it was declared, in substance, that said James was the owner of certain parcels of the land described in his complaint in that action, that Robert had held the same in trust for him, and that such trust was fully executed; but, as to other portions of the lands which were the subject of the suit, including the tract involved in the present action, it was declared that James had no right, title, or interest, legal, or equitable, in or to the same, and that Robert was the owner thereof when the action was begun and that his heirs (the defendants in the present action) were owners of the same at the time of such agreement; said agreement contained no admission that the deed of January 29, 1875, ever had the character of a mortgage. There was further evidence, without conflict, that soon after the decree in the suit for divorce by which the parcel here claimed by plaintiff was set over to her mother, the latter requested a deed thereof from Robert Ord; that he refused, and then asserted that he had purchased the property <sup>314</sup> for cash paid to his brother, and that he owned the same. Robert Ord had exclusive and notorious possession of the land from 1875 until his death, and such possession was continued by his representatives or heirs after his death, and for more than five years next before the commencement of this action Robert and his said successors paid the taxes thereon.

"It is a settled rule," said the court in *Spect v. Spect*, 88 Cal. 443, 22 Am. St. Rep. 314, "that a mortgagor cannot maintain ejectment against his mortgagee until the debt is paid." In-

voking this principle, counsel for plaintiff contend that from 1875 to 1890 the statute of limitations was not in motion against her title. They say that the mortgage "was not actually satisfied and discharged until the settlement, which was concluded June 28, 1890. Then for the first time a right of action by this plaintiff for possession of the premises accrued." But, from the inability of the mortgagor or his successor in the title to maintain an action to recover the premises in the possession of the mortgagee without discharging the mortgage, it does not at all follow that he may not be barred by adverse holding of the mortgagee. If the evidence here shows that the deed of January 29, 1875, by James to Robert Ord was a mortgage, it also shows that the condition thereof was broken years before the action commenced by the mortgagor against the mortgagee to compel a reconveyance. Of course, he who seeks equity must do equity, and a mortgagor who seeks to quiet title against the mortgagee in possession must pay the mortgage as a condition of success in his suit: *Brandt v. Thompson*, 91 Cal. 458; but if the mortgagee in such a case denies that there is any equity to be done between him and the mortgagor, asserts title in himself and otherwise manifests an adverse holding, the mortgagor or those claiming in his right must proceed against him within five years or lose all remedy, whether the debt or obligation secured by the mortgage has been paid or not: *Code Civ. Proc.*, sec. 346; *Warder v. Enslin*, 73 Cal. 291. Here there was a clear showing of a hostile holding against both James Ord and the plaintiff, beginning at least as early as the year 1886 and continuing for more than five years before the commencement of the action. Had James Ord not been divested of the title, and had he omitted to bring any action until the time the plaintiff set on foot the present suit—December <sup>315</sup> 8, 1891—it is plain he would have been barred, and we think the plaintiff is in no better predicament. Her remedy was not saved by the action brought by James against Robert in 1887; the title of James was divested in the divorce suit twelve years before, and thenceforward his acts were those of a stranger to the premises: *Barber v. Babel*, 36 Cal 20, and cases cited. Besides, he agreed with the heirs of Robert in that action that they were the owners of the land. Of course, this fact could not defeat any rights of the plaintiff, but it shows that as against her there was no abatement of the adverse claims of the defendants, and that no redemption of the land was contemplated by the parties to such agreement.

It follows that the finding that the alleged mortgage was discharged by the settlement of June, 1890, is not supported by the evidence. With the overthrow of this finding the judgment must fall.

For the foregoing reasons the judgment and order appealed from must be reversed, and it is so ordered.

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**MORTGAGE—ADVERSE POSSESSION BETWEEN MORTGAGOR AND MORTGAGEE.**—A mortgagor's possession may be adverse to the mortgagee: *Drayton v. Marshall*, Rice Eq. 373; 33 Am. Dec. 84. See *Newman v. Chapman*, 2 Rand. 93; 14 Am. Dec. 768. Possession of mortgaged premises by the mortgagee, under an agreement to apply the rents and profits to the satisfaction of the mortgage debt, does not become adverse to the mortgagor until the debt is fully discharged from that source: *Anding v. Davis*, 38 Miss. 574; 77 Am. Dec. 658. Prescriptive title cannot be acquired except by occupancy under a claim of ownership: *Willamette Real Estate Co. v. Hendrix*, 28 Or. 485; 52 Am. St. Rep. 800. See *Borden v. Clow*, 21 Nev. 275; 37 Am. St. Rep. 511.

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## AINS WORTH v. BANK OF CALIFORNIA.

[119 CALIFORNIA, 470.]

### COUNTERCLAIM—DEATH OF ONE OF THE PARTIES.

In an action brought by an administrator of a decedent, the defendant may assert a counterclaim based upon a demand in his favor against the decedent, though it did not become due until after the latter's death, if it was due when the action was commenced.

**ESTATES OF DECEDENTS—TITLE OF THE ADMINISTRATOR TO CHOSE IN ACTION—SETOFF.**—Upon the appointment of an administrator, all choses in action in favor of his intestate pass to him immediately, but subject to any right of set off or counterclaim existing in favor of the debtor.

James M. Allen, for the appellant.

Davis & Hill and Rodgers & Paterson, for the respondents.

**471** CHIPMAN, C. The facts are admitted and found to be as follows: September 27, 1895, George J. Ainsworth, plaintiff's testator, executed his note to the Bank of California for \$10,000, payable December 26, 1895. He was a customer of the bank, and at his death, October 20, 1895, had on deposit there to his credit the sum of \$5,974.25. On December 26, 1895, the day the note matured, the bank, without the consent of respondent, applied this sum on the note. On December 30, 1895, letters testamentary were issued to respondent by the superior court of Alameda county. February 17, 1896,



respondent presented her check for said deposit to the bank and demanded payment, which was refused. February 21, 1896, the bank presented its claim on said note therein, crediting it with said sum of \$5,974.53, which claim was rejected on March 3d. On March 9, 1896, plaintiff commenced her action to recover the sum so deposited. In its answer the bank set up its presented claim and claimed the right to use it as a counterclaim under sections 437 and 438 of the Code of Civil Procedure, and also the right to apply said deposit on said note by virtue of its banker's lien, and also that the two debts—the note and said deposit of \$5,974.53—should be deemed compensated, so far as they equal each other, under section 440 of the Code of Civil Procedure. There is no finding or evidence as to the solvency or insolvency of the estate. The court denied the right of defendant to use the note as a counterclaim, or to apply the said sum of \$5,974.53 on the note, and denied the right to such "compensation." Judgment was given for plaintiff for \$5,974.53, and for defendant for \$10,000 <sup>472</sup> and interest payable in due course of administration. The appeal is from the judgment and comes here on bill of exceptions.

Under section 437 a defendant may answer by: "2. A statement of any new matter constituting a defense or counterclaim." A counterclaim is by section 438, defined to be: "One existing in favor of defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: . . . 2. In an action arising upon contract; any other cause of action arising also upon contract and existing at the commencement of the action."

Counsel for plaintiff make an ingenious argument to the effect that these sections simply prescribe a rule for pleading counterclaims—how to plead them and what qualities they must possess in order that they may be pleaded—but leaves the question entirely open "as to what counterclaims are, and what are not, claims upon which a several judgment might be had in the action." It is true that section 438 says that the counterclaim mentioned in section 437 must possess certain elements, but it goes further, we think, and defines what a counterclaim is, as well as when it may be pleaded. The section practically says that a counterclaim is defined to be what the section says may be pleaded as such. It is suggested by respondent that a rule which would allow this counter-

claim would, in many cases, take assets out of administration, through proceedings in which other creditors could not be heard; would pay one creditor to the exclusion of others; would render inoperative provisions for the temporary support of the family of the deceased—to which all debts are postponed; and therefore the rule cannot be sound: Citing *Fitzpatrick v. Brady*, 6 Hill, 581; *Leiper v. Levis*, 15 Serg. & R. 108; *Jordan v. National etc. Bank*, 74 N. Y. 467; 30 Am. Rep. 319.

Respondent makes the point also that the counterclaim should be rejected for want of mutuality, grounding the objection upon the fact that the note of deceased was not due when he died, and that nothing ever did become due from him; that plaintiff sued as executrix in her representative capacity for a debt due the deceased at his death, and her title and right of action are to be considered as of that date, as is also the right of defendant to set up the counterclaim, at which time nothing was due defendant: <sup>473</sup> Citing *Patterson v. Patterson*, 59 N. Y. 574; 17 Am. Rep. 384.

The contention is that if A owes B \$1,000 upon a promissory note, and B owes A a like sum on a promissory note, both due on the same day in the future, and A meanwhile dies, A's administrator may sue and recover when B's note to A matures, but B cannot plead A's note by way of counterclaim because B now owes the estate and not A, and there is no mutuality because a right of action on A's note did not accrue in A's lifetime. Such is the apparent reasoning of *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384, and also of *Jordan v. National etc. Bank*, 74 N. Y. 467, 30 Am. Rep. 319, cited by respondent.

In the case cited from 6 Hill the pro rata distribution of an estate was not a question; the case is not in point. *Leiper v. Levis*, 15 Serg. & R. 108, was decided upon the construction given to the act of 1794, then in force in the state of Pennsylvania, and the question was as to the right of a judgment creditor of an insolvent estate gaining a priority over other judgment creditors by taking out and levying a *feri facias* which related to a day prior to the intestate's death. The case does not seem to throw any light on this case.

In *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384, plaintiff, as executrix, brought suit to foreclose a mortgage executed by defendant to plaintiff's testator given to secure a promise in the nature of an annuity, which by its terms was made to depend upon the testator's death, and was payable to his executrix

or administratrix after his death. Defendant set up as counterclaim a claim for rent due him from the testator at the time of his decease. It was said there was no mutuality, and the setoff was disallowed. The case follows the construction given by the English courts to the statute of 2 George II, chapter 22, to which the New York statute was similar. The decision is well considered and was followed in *Jordan v. National etc. Bank*, 74 N. Y. 467; 30 Am. Rep. 319. The statute of New York (2 Rev. Stats., sec. 23) reads: "In suits brought by executors, etc., demands existing against their testators, etc., and belonging to the defendant at the time of their death, may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased." The case of *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384, does not necessarily support respondent, although, as interpreted in *Jordan v. National* <sup>474</sup> etc. Bank, 74 N. Y. 467, 30 Am. Rep. 319, it may be so applied. In this latter case the relation of the claims of the parties was the reverse of *Patterson v. Patterson*, 59 N. Y. 574; 17 Am. Rep. 384. *Jordan* sued as administratrix on a demand owned by the intestate in his lifetime, and due and payable to him then; while the promissory note which defendant sought to set off, though owned by it in the lifetime of the intestate, was not due and payable until after his death. It was held that for a demand to be set off against an executor or administrator, in an action brought by him, it must have been due and payable from the decedent in his lifetime. We think that the provisions of our section 438 of the Code of Civil Procedure, read with section 440, are different from the New York statute. The clause "any other cause of action arising upon contract, and existing at the commencement of the action" (Code Civ. Proc., sec. 438, subd. 2) is not in the New York statute. Section 440 provides that: "When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other." Our statute of setoff, we think, relates to the situation of the parties "at the commencement of the action," and the death of one of the parties to the demand, though such death occur before the maturity of the demand, will not change the relative rights of the parties in pleading a counterclaim or



in compensating the claims so far as they equal each other, provided the setoff be due when the action is commenced.

In New Hampshire and Massachusetts, the statutes were said to be substantially the same as the statute of George II. In both these states the rule contended for by appellant was sustained. In *Mathewson v. Strafford Bank*, 45 N. H. 104, where the question was examined, and the rule as in *McDonald v. Webster*, 2 Mass. 498, and *Bigelow v. Folger*, 2 Met. 255, was followed, a clear distinction is drawn between debts or demands to and from executors in their own right "and those where the transactions were wholly between the deceased and the adverse party in the lifetime of the former, but the contingent claims have become absolute, and the claims not due have become payable <sup>475</sup> after the decease." Said the court: "We are unable to see why such demands should not be set off against an administrator when they become absolute and payable."

We cannot assent to the doctrine that our statute does not apply because the cross-demand of the bank was not due when plaintiff's testate died; it was due when action was brought: *St. Louis Nat. Bank v. Gay*, 101 Cal. 286. The debt existed at his death.

Section 61 of the Indiana code (2 Rev. Stats. 1876, p. 64) reads almost as our section 440, *supra*; there is no substantial difference. In *Convery v. Langdon*, 66 Ind. 311, the New York cases and the New York statute *supra* were considered, and it was said: "The cross-demand must have been an existing demand against the testator or intestate at his death. It is not necessary that the cross-demand thus existing should have become due at the time of the testator's death. It is sufficient if it become due and payable in time to be pleaded as a setoff in the same manner as if the testator or intestate had lived to bring the action": See, also, *Waterman on Setoff*, secs. 24, 97; *Rawson v. Copland*, 3 Barb. Ch. 166 (limited and distinguished in *Patterson v. Patterson*, 59 N. Y. 574; 17 Am. Rep. 384); *Mathewson v. Strafford Bank*, 45 N. H. 104; *Skiles v. Houston*, 110 Pa. St. 255; *Byles on Bills*, 531, and note 8; *Temple v. Scott*, 3 Minn. 419.

It is laid down as the rule in *Woerner's Law of Administration*, volume 2, section 398, supported by cases there cited, that where the defendant and deceased had mutual dealings, the judgment can be only for the difference between the claims of the creditor and the decedent; and this is there said to be true,

whether the debts are payable simultaneously or the one in praesenti and the other in futuro.

The claim of respondent, that by the death of plaintiff's testator the demand passed eo instanti to his representatives and took date by relation to the date of the testator's death, is correct only to this extent, that it passed subject to any right of setoff or counterclaim in appellant. The demand was not an asset of the estate in the sense claimed and to the exclusion of appellant's right of setoff. As was said in *Richardson v. Parker*, 2 Swan, 529: "The notes and accounts of the deceased are not assets if they have been discharged by payment, the creation of adverse accounts, or otherwise; it is only what remains after all just settlements <sup>476</sup> with the debtor of the estate, which goes into the funds for distribution": See *Finnell v. Nesbit*, 16 B. Mon. 351, and *Ely v. Commonwealth*, 5 Dana, 398, therein referred to. See, also, *Ford v. Thornton*, 3 Leigh, 695.

That the title of the administrator to the assets of the estate takes effect by relation, from the intestate's death, respondent cites *Babcock v. Booth*, 2 Hill, 181; 38 Am. Dec. 578. In that case, the general rule was stated to be that the administrator can only maintain such claims as the testator or intestate might have successfully asserted if living. An exception to the rule was found in the case cited, however, where the deceased was a fraudulent vendor who remained in possession until his death, and as to his creditors the sale was held void against the fraudulent vendee, who took the property from the possession of the widow after her husband died. We do not think the case before us would be an exception to the general rule as above stated, or that the creditors of the estate would stand in any better position than the testator would himself have stood had he lived and had drawn his check after his note was due and had been refused payment.

Under our code provisions as to claims against estates of deceased persons, it is compulsory upon the claimant to present his claim under oath stating all offsets and credits. Without doing this he cannot maintain an action or be paid his claim. The purpose of the law, we think, is to ascertain the balance existing, and to give to both the claimant and the estate the benefit of all just offsets whether the estate be solvent or insolvent. As was said in *Aldrich v. Campbell*, 4 Gray, 284: "The settlements with such estates [insolvent] are final, and all mutual demands are to be balanced. Claims not liquidated, and debts

absolutely due, though payable in the future, are to be included. The balance found upon such adjustment is the only debt remaining. In the case of an insolvent estate of one deceased, all claims existing at the time of the death are to be set off." If this is sound law in the case of insolvent estates, and we think it is, it certainly must be so if the estate be solvent, for no harm can come to anyone by applying the rule in the latter case.

We find nothing in the sections of the Code of Civil Procedure cited by respondent in conflict with this view of the matter. <sup>477</sup> The inventory required to be made by the administrator or executor by sections 1443-1446, and the duty imposed by section 1581 to take into his possession all the estate, etc., and to collect all debts due to decedent, etc., cannot affect the rights of creditors of the deceased or change their relations in respect of mutual obligations.

The view we have taken of the case makes it unnecessary to decide whether the appellant had a right to apply the deposit by virtue of the banker's lien claimed by it. We think the court below erred in its conclusions, and advise that its judgment be reversed and that judgment be ordered for defendant, payable in due course of administration, for the amount of its note and interest, less the amount of said deposit credited as of the date of December 26, 1895, the date when indorsed on said note.

Haynes, C., and Searls, C., concurred.

For the reasons given in the foregoing opinion, the judgment is reversed and the judgment ordered for defendant, payable in due course of administration, for the amount of its note and interest, less the amount of said deposit credited as of the date of December 26, 1895, the date when indorsed on said note.

McFarland, J., Garoutte, J., Van Fleet, J.

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**EXECUTORS AND ADMINISTRATORS—TITLE TO PERSONAL ESTATE OF DECEDENT—COUNTERCLAIMS.**—An executor is vested with title to all the movable property and rights of action which the deceased possessed at the instant of his death: *Petersen v. Chemical Bank*, 32 N. Y. 21; 88 Am. Dec. 298; *Babcock v. Booth*, 2 Hill, 181; 38 Am. Dec. 578. In a suit brought by the administrator of an insolvent estate, a setoff of a demand not yet due from the estate has been denied; but allowed where it was not due at the time of the death, but became due before the commencement of the suit, or pending the suit: *Monographic note to St. Paul etc. Trust Co. v. Leck*, 47 Am. St. Rep. 588, 589. See, also, *Mills v. Lumpkin*, 1 Ga. 511; 44 Am. Dec. 677; *Patterson v. Patterson*, 59 N. Y. 574; 17 Am. Rep. 384.



**HAWXHURST v. RATHGEB.**

[119 CALIFORNIA, 581.]

**PRACTICE.—AFTER FINDINGS HAVE BEEN FILED** and a judgment entered thereon, there is but one method by which the findings can be changed or modified, except, perhaps, in respect to a mere clerical error, and that is the mode pointed out by statute by the granting of a new trial. Until the findings are thus set aside, they must stand in their integrity as originally made.

**POWER OF ATTORNEY—WHEN DOES NOT AUTHORIZE A PLEDGE.**—A power of attorney authorizing the sale, transfer, or release of certain mortgages and the indorsement and transfer of notes secured thereby, and the receiving payment of such notes and the giving of acquittances therefor, does not authorize the borrowing of money or the pledging of the notes or mortgages for any purpose.

**POWERS OF ATTORNEY—CONSTRUCTION OF.**—The words "sell and convey," when employed in a power of attorney, do not include authority to mortgage or otherwise dispose of the property than by a sale and conveyance.

F. J. & J. H. Moore, for the appellant.

R. Thompson, for the respondent.

**532 VAN FLEET, J.** Appeal from judgment and order denying a new trial. The action involves the rights of the parties in two certain notes and mortgages executed by one Kunz to defendant, which plaintiff claims to own by virtue of an assignment and delivery thereof to her, made in defendant's name by one C. E. K. Royce, claiming to act as attorney in fact for defendant under an alleged power of attorney from defendant to said Royce.

The trial court found that defendant never executed the power of attorney to Royce, and that the latter had no authority to make the assignment of the securities, and gave judgment in favor of defendant.

Plaintiff moved for a new trial, on the ground, among others, of insufficiency of the evidence to warrant the findings. In passing upon this motion, the court made an order, the material part of which was as follows: "It is ordered that said plaintiff's motion for a new trial of this action be and the same is hereby denied. This order is made solely upon the ground that, even assuming that the letter of attorney from defendant to Royce was executed by defendant, it conferred upon Royce no power to assign the note and mortgage therein mentioned to secure his individual debt. Otherwise a new trial would have been granted."

Plaintiff contends that the effect of the language used by the

court below, in its order denying a new trial, was to change and reverse its finding that defendant did not execute the power of attorney to Royce, and to substitute therefor a finding in favor of the due execution and authenticity of that instrument; and, as plaintiff further contends that the court misinterpreted the legal effect of the power of attorney in holding that it did not authorize Royce to assign the securities in question to secure his individual debt, her proposition is in substance that the judgment is left without support in the findings, and must be reversed.

But whatever the effect of the recitals in the order relied on by appellant, they did not operate to change the findings in <sup>533</sup> the case as theretofore existing. After findings have been filed, and judgment entered thereon, there is but one method by which those findings can be competently changed or modified—except, perhaps, in respect of a mere clerical error or mispcription—and that is the mode pointed out by the statute, by the granting of a new trial. Until the findings are thus set aside, they must, under our present system, stand in their integrity as originally made: *Pico v. Sepulveda*, 66 Cal. 336; *Thompson v. White*, 63 Cal. 505; *Hayne on New Trial and Appeal*, sec. 247, and cases cited.

However, we deem it unnecessary to inquire further what the precise effect of those recitals of the order would have been upon plaintiff's rights had the court below been, as contended by appellant, in error as to the legal effect of the alleged power, since we are satisfied that not only was the learned judge clearly right in holding that the instrument gave Royce no power to assign the securities for his own debt, but further that it conferred no authority to assign them in pledge or mortgage for any purpose. Plaintiff says that the court has not found that Royce assigned the property as security for his own debt. We think the finding will bear no other construction. But, if this were otherwise, the facts as to the transactions are found, and very clearly show that the notes and mortgages were pledged as security for a loan of money. This transaction was not within the terms of the power conferred. The language of the power was "to sell, transfer, and release two certain mortgages executed by Gotthard Kunz" (describing them); "to indorse and transfer the notes secured by said mortgages; to sell and transfer my claims for said notes and mortgages filed in the superior court of said San Luis Obispo county, state of California, in the matter of the estate of said Gotthard Kunz, now deceased,

and to receive payment of said claims, and give acquittances thereof." The effect of this language was to confer a power to sell and transfer the title to the securities absolutely, or, if not so sold, to collect them from the estate of Kunz. There is nothing in the language which by any proper construction purports to confer a power to pledge or hypothecate the securities for any purpose, or to borrow money thereon. The words "sell and transfer," as there used, are of no broader signification than the words "sell and convey" used with reference to a conveyance of <sup>534</sup> real estate, and the latter employed as the operative words in a power to convey land do not carry authority to mortgage or otherwise dispose of the property: *Bloomer v. Waldron*, 3 Hill, 361, 366, 367; *Golinsky v. Allison*, 114 Cal. 458; *Dupont v. Wertheman*, 10 Cal. 354. Whether, therefore, the power of attorney be genuine or not can make no difference to plaintiff. The act of Royce, being in excess of the authority conferred, was void, and vested no right in plaintiff: *Frink v. Roe*, 70 Cal. 313, and cases above cited.

We find no want in the evidence to support the findings, and the judgment and order must be affirmed.

It is so ordered.

Harrison, J., concurred.

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**APPELLATE PROCEDURE—NECESSITY OF MOTION FOR NEW TRIAL.**—One who relies upon the insufficiency of the evidence to sustain the verdict of a jury or the finding of a court must move for a new trial, otherwise a supreme court cannot review the evidence on appeal: *Evenson v. Webster*, 3 S. Dak. 382; 44 Am. St. Rep. 802.

**POWERS OF ATTORNEY—CONSTRUCTION OF.**—Powers of attorney receive a strict interpretation, and the authority given by them is never extended by intendment or construction beyond that which is given in terms, or absolutely necessary to carry the authority into effect: *Gilbert v. How*, 45 Minn. 121; 22 Am. St. Rep. 724, and note. An authority by will to "sell and dispose of" the estate does not warrant a mortgage of it: *Stokes v. Payne*, 58 Miss. 614; 38 Am. Rep. 340, and note; and a power to sell personalty does not authorize a barter or exchange: *Cleveland v. Bank of Ohio*, 16 Ohio St. 236; 88 Am. Dec. 445; nor does a power of sale authorize the transfer of the property of the principal in payment of a debt: *Durham v. Oddle*, 1 Martin, N. S., 444; 14 Am. Dec. 190. See *Campbell v. Foster Home Assn.*, 163 Pa. St. 609; 43 Am. St. Rep. 818, and note; *Wood v. Goodridge*, 6 Cush. 117; 52 Am. Dec. 771.



## GOAD v. MONTGOMERY.

[119 CALIFORNIA, 552.]

**ESTATES OF DECEDENTS.—A DECREE OF DISTRIBUTION** by virtue of which property is distributed to trustees is conclusive respecting their powers and duties. Though the decree purports to distribute the property in accordance with the terms of the will, the rights of the parties must thereafter be measured by the terms of the decree and not by those of the will. The will can no more be used as evidence to impeach the decree than can any other evidence upon which a judgment is rendered.

**ESTATES OF DECEDENTS—CONFLICT BETWEEN WILL AND DECREE OF DISTRIBUTION.**—In granting a decree of distribution the court must give construction as to the terms of the will. The decree, when entered, supersedes the will and prevails over any provision therein which may be thought inconsistent with the decree.

**TRUSTEES, POWER OF TO DISPOSE OF PROPERTY.**—In the absence of any authority given expressly or by implication in an instrument creating a trust, property which has passed into the hands of the trustees to be held by them for a limited time must be kept by them and delivered in kind to the beneficiaries at the termination of the trust.

**A TRUST TO MANAGE PROPERTY** and to pay over and deliver it to beneficiaries at a time specified implies that the trustees are to retain it in their control without authority to sell or otherwise dispose of it, and that it is to be delivered to the beneficiaries, so far as consistent with the nature of the property, in the same condition in which it was received by the trustees. If, however, the property consists of bonds and mortgages, payment thereof may be made to the trustees, who may reinvest the proceeds in other securities.

**POWER OF SALE GIVEN TO EXECUTORS DOES NOT CONTINUE ON THEIR BECOMING TRUSTEES.**—If a testator by his will appoints certain persons executors, gives them power to sell, and also bequeaths and devises his estate to the same persons to hold in trust for his heirs, their power of sale ceases on their discharge as executors, after which time their powers must be measured by the decree distributing the property to them to hold in trust.

Platte & Bayne and Rodgers & Paterson, for the appellants.

Franklin K. Land, G. Whitfield Lane, and W. S. Goodfellow, for the respondents.

**554 HARRISON, J.** Alexander Montgomery died November 4, 1893, leaving a last will and testament containing the following provisions:

"Fifth. I give and bequeath to W. F. Goad and A. W. Foster one million (\$1,000,000) dollars, in trust for my two minor children, Annie A. Montgomery and Hazel G. Montgomery, to be managed by said trustees.

"Said trustees shall pay over one-half thereof to my daughter,

Annie A. Montgomery, when she attains the age of majority, and the remainder thereof to my daughter, Hazel G. Montgomery, when she attains the age of majority.

"Ninth. I hereby authorize my executors hereinafter named to sell, convey, and dispose of all property that I may own, as in their judgment may be for the best interest of said estate, without any order from any court.

"Twelfth. I hereby nominate and appoint W. F. Goad and A. <sup>555</sup> W. Foster executors of this my last will and testament, and request that no bonds be required of them as such executors, or as trustees hereinunder."

The will was admitted to probate in the superior court of San Francisco November 22, 1893, and letters testamentary issued to the executors therein named. In April, 1895, while the administration of the estate was still pending, Goad and Foster, as the trustees for the children of the deceased, brought an action in the superior court for San Francisco against the several parties interested in the estate, setting forth in their complaint the execution and terms of the will; that the estate of said deceased consisted mainly of real estate and of indebtedness secured by real estate; that there was not in the hands of the executors money sufficient to pay the several legacies named in the will; that owing to the depreciated condition of the market and business generally, any attempt to convert the real estate into money would not produce sufficient to pay the legacies, and would greatly postpone the settlement of the estate; that in view of these considerations it had been proposed that, instead of converting the property of the estate into money, it should be distributed in kind to those interested therein; that as trustees under the provisions of the will they had doubts as to their rights and power with reference to said proposal, and they thereupon asked the court to instruct and direct them as to their duties and powers relative thereto. Upon the trial of the cause the court found substantially in accordance with the averments in the complaint, and also that it was for the best interest of the children that certain property should be accepted by the trustees in lieu of the moneys due them under the bequest, and thereupon, May 3, 1895, rendered its judgment directing and instructing the trustees to accept certain designated property "in lieu and in full satisfaction of the pecuniary legacy bequeathed to them as aforesaid by said will, in trust for said Annie A. Montgomery and Hazel G. Montgomery," and also to consent that said property be by the decree

of distribution to be made in said estate distributed to them in trust as aforesaid, in lieu and in full satisfaction of the said pecuniary legacy. Thereafter, May 6, 1895, the executors of said will filed their petition for a final distribution of the estate, and on May 15th, the court made its order and decree of distribution by which the property <sup>550</sup> designated in the above-named decree was distributed to the said Goad and Foster, as trustees under the will of said Montgomery, in trust for the children during their minority, "and in trust that the said trustees shall manage the said property and pay over and deliver one-half of said property, so distributed to them as aforesaid," to each of the said children upon their respectively attaining the age of majority. The decree of distribution contained also the following provision: "And said property so distributed to said W. F. Goad and A. W. Foster, as trustees as last aforesaid, is so distributed to them in lieu and in full satisfaction of the legacy of one million (\$1,000,000) dollars, and of the interest thereon bequeathed to said W. F. Goad and A. W. Foster as trustees for said Annie A. Montgomery and Hazel G. Montgomery in and by the provisions of the said will." The property thus distributed to the trustees includes sundry promissory notes secured by mortgages upon real estate, and also various parcels of land situated in different parts of the state, and the trustees being in doubt as to their powers and duties with reference to the said property—particularly in reference to their power to sell the real estate without the order and approval of the superior court—brought the present action for the purpose of having their rights, powers, and duties in the premises declared and defined. The superior court determined, among other things, that, as to the legacy of one million dollars given to them in trust by the will of Montgomery, the trustees were vested "with the same powers that all trustees in such cases possess, and none other, to wit, the right and power to control and handle the fund, to loan it out at interest on approved securities, such as bonds, mortgages, and the like, and to purchase secure interest bearing bonds therewith.

"That the trustees have no power or authority to sell or dispose of all or any portion of the property which was theretofore distributed to them as such trustees by said decree of distribution (in lieu of said pecuniary legacy in said will) made and entered in this court in the matter of the estate of said Alexander Montgomery, deceased, save and except as such sale or disposition may be directed by order of a court of competent jurisdiction, and subject to confirmation by such court.



"That the authority conferred on the executors of said will by <sup>557</sup> the provisions of the clause of said will marked and numbered 'Ninth' was meant to be and was limited to the sale, conveyance, and disposition of the property of said testator so far only as was required or advisable in the administration in probate and the distribution of said estate, and was not intended by said testator to confer any power of sale on the said trustees mentioned in said will."

From these portions of the judgment the plaintiffs have appealed.

The decree of distribution is the instrument by virtue of which the plaintiffs have received the property in trust for the children, and their powers and duties in regard to that property are to be measured by the terms of this decree. For the purpose of enabling the superior court to distribute the estate of a testator in accordance with his will, it is required to consider the will as well as the estate left by him, and to construe its terms for the purpose of determining his intention, and make its order or decree of distribution in accordance with such construction; but, as in the case of a judicial determination of any other instrument, the instrument is but evidence upon which the court acts in rendering its judgment. The judgment is the final determination of the rights of the parties to the proceeding, and upon its entry their rights are thereafter to be measured by the terms of the judgment, and not by the instrument. A will can no more be used as evidence to impeach the decree of distribution than can any other evidence upon which a judgment is rendered. Section 1665 of the Code of Civil Procedure requires the court, in making distribution of the estate, to distribute the residue of the estate in the hands of the executor "among the persons who by law are entitled thereto," and the provision in section 1666 that the court must name in the decree "the persons and the proportions or parts to which each shall be entitled" requires the court in making such decree to give a construction to the terms of the will. The further provision in the same section that "such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal," precludes all right to impeach the decree except upon an appeal, and causes the decree to supersede the will and to prevail over any provision therein which may be thought inconsistent <sup>558</sup> with the decree. The decree is conclusive, not only

as to the persons who have any rights in the estate, but also as to the extent and limitation of their rights. Whether the distribution is to individuals in their own right, or to hold for others under specified trusts, the rights of all parties interested in the estate are determined by the decree, and thereafter it becomes immaterial to consider whether the will has received a proper construction. The court may incorporate the provisions of the will in its decree, either in express terms or by reference thereto, as was the case in *Goldtree v. Thompson*, 79 Cal. 613, where the decree distributed the property to the trustees to hold in the manner named and set forth in the will, "and to which reference is hereby particularly made as a guide to the trustees in the discharge of their trust." In such a case, the terms of the will become the language of the decree, but it is still the decree, and not the will, by which the rights of the parties are determined.

If the plaintiffs herein had felt that the decree of distribution was erroneous or defective, in not giving to them the powers which, in their opinion, the terms of the will authorized to be conferred upon them, they could have appealed therefrom and had the decree corrected, but by their failure to appeal the decree has become conclusive upon them, and they can no longer contend for a different construction than such as its terms import: *Estate of Garraud*, 36 Cal. 277; *Daly v. Pennie*, 86 Cal. 552; 21 Am. St. Rep. 61; *William Hill Co. v. Lawler*, 116 Cal. 359. In *Estate of Hinckley*, 58 Cal. 457, an appeal was taken directly from the decree of distribution, and the court below was directed to modify its decree in conformity with what this court held to be a correct construction of the will, and in its opinion, after indorsing the following language of the lower court, viz.: "It is under our system the necessary province of a probate court to inquire and determine whether a valid trust has been created," said also: "We may add that it is within the province of the probate court to define the rights of all who have legally or equitably any interest in the property of the estate derived from the will, whether they are entitled to any present enjoyment or their interests are contingent"; thus clearly indicating that, in the absence of any appeal from that decree, the action of the probate court would have been conclusive.

559 In the decree of distribution the court finds as a fact: "That the property of said estate is of great variety and extent; that it has been found impracticable to convert the same into

money without a probable loss to the legatees and devisees named in said will, and that, if the property of said estate should be held until converted into money, the delay in the distribution would be indefinite"; and the court also found as another fact that for these and other reasons the legatees, Goad and Foster, had been authorized by a decree rendered in an action brought by them for that purpose to accept the property which was distributed to them in lieu and full satisfaction of the legacy to them provided in the will; but, while these facts are recited in the decree and were considered by the court, the decree of distribution does not purport to have been made by reason of such judgment, or to have been dependent thereon. Counsel have not discussed the effect of this judgment, and it is unnecessary for us to consider its effect, or whether there was any authority in the court to render it. It would be an anomaly in jurisprudence that a court which is vested with full jurisdiction in matters of probate should be controlled in the exercise of that jurisdiction by the action of a co-ordinate court which has neither controlling nor revisory jurisdiction in such matters. The court was not required to follow that judgment, but could distribute the estate in accordance with its own views (see *Siddall v. Harrison*, 73 Cal. 560); and, inasmuch as the decree of distribution does not purport to have been made by reason of such judgment, it must be regarded as having been made upon an exercise by the court of its own judgment upon the construction to be given to the will and the consideration of the rights of the parties thereunder. The fact that the distribution which it made to the plaintiffs is of the same property as that which they were authorized to receive by the said judgment is only a coincidence, and not a consequence.

By the terms of the decree of distribution the property distributed to the plaintiffs was to be held by them in trust, that they should "manage the said property and pay over and deliver the same" to the children as they should respectively attain the age of majority. This distribution of the property, "in lieu and in full satisfaction of the legacy of one million dollars," must be regarded as a construction by the court of the testator's intention <sup>560</sup> in creating the trust, and is to be treated as if he had created the trust in the terms used in the decree. In the absence of any authority given expressly or by implication in the instrument creating a trust, property which is placed in the hands of trustees, to be held by them for a limited time, or until the happening of an event, must be kept



by them and delivered in kind to the beneficiaries at the termination of the trust: *Harrison v. Harrison*, 2 Atk. 121. Mr. Perry says: "Under no circumstances can a trustee or guardian of an infant convert the ward's real estate into personalty by a sale without the order or decree or license of a court": Perry on Trusts, sec. 609. The trust herein to "manage" the property implies, by force of the term used, that the trustees are to retain it under their control, and is inconsistent with the idea that they have authority to sell or otherwise dispose of it. "To manage an estate is, in common parlance, as well as legal acceptance, no authority to part with the entire interest": *Roosevelt v. Fulton*, 7 Cow. 81. The further provision that the trustees are to "pay over and deliver" to the beneficiaries "the property so distributed to them" at the termination of the trust indicates that, so far as is consistent with the nature of the property, the beneficiaries are entitled to receive it in the same condition in which it was received by the trustees. This provision applies to the different kinds of property distributed to the trustees, and indicates that of said property—*reddendo singula singulis*—the children upon reaching their majority are to be paid that which is susceptible of payment, and to have delivered to them that which is not so susceptible. It was shown that the property received by the trustees consisted of real estate amounting in value to about four hundred thousand dollars, and bonds and mortgages amounting in value to about six hundred thousand dollars. The duty of the trustees in regard to the bonds and mortgages that may mature during the continuance of the trust is not involved in the present appeal. Their right to receive payment thereon, and to invest the sums so received in other securities, is consistent with their duty to pay over and deliver to the children the property distributed to them, but cannot be extended to include the right to sell or otherwise dispose of the real estate, without a previous order or direction from the court.

<sup>561</sup> Although the persons named in the will as its executors are the same as those to whom the testator directed the property to be distributed in trust for his children, yet the power of sale conferred upon the executors was not given by him to them as trustees, but terminated with their discharge as executors. The fact that the two offices are held successively by the same individuals does not give to them in the exercise of one office the power that had been conferred for the exercise of the other. Their rights and duties as executors were quite dis-

tinct from the duties imposed upon them as trustees, and their powers and duties as trustees did not begin until as executors they had ceased to have any control over the property, and, as above seen, the decree of distribution is alone to be considered for the purpose of ascertaining their powers. The testator may have been willing to give this power of sale to his executors, since he knew that every sale by them must be confirmed by the court before the title to the land would pass from his estate, while he might have been unwilling to vest the same persons with a power whose exercise would be without such supervision and control.

The judgment is affirmed.

McFarland, J., Henshaw, J., Garoutte, J., and Van Fleet, J., concurred.

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THE PRINCIPAL CASE was reaffirmed and followed in *Estate of Trescony*, 119 Cal. 568. It appeared in that case that a decree of distribution had been entered in the estate of the decedent by which one-third thereof had been distributed to trustees upon certain trusts expressed in the decree, and the other two-thirds were distributed to other beneficiaries under the will. Afterward, a suit in partition was brought by some of the distributees against the others for the partition of real estate, in which suit an interlocutory decree was entered directing partition to be made. Referees were subsequently appointed, who made partition and filed a report of their proceedings, and this report was confirmed, and by it certain parcels of land were allotted to the trustees upon the trusts named in the will. The trustees afterward filed in court their account as such of their management of the trust property, and such account was objected to on the ground that it purported to account for but one-third of the estate of the testator, whereas under the last will and testament and the decree of distribution the trustees took the entire estate of the testator as trustees, and it was urged in the argument that certain trusts designated in the will were void under the statute of the state as being in restraint of alienation, and therefore that the whole of the estate of the decedent had vested in the trustees for the use and benefit of the beneficiaries who were objecting to the accounts. It was apparently true that the trusts against which objection was made were subject to this objection, and that therefore they ought to have been disregarded in the decree of distribution. As it had, however, on the contrary, proceeded upon the theory that such trusts were valid, it was held that the power of the trustees and the extent of their title were conclusively fixed by the decree of distribution, and therefore that it was not open to the beneficiaries to urge that, under the will, the whole of the property was held in trust for them. Substantially the same decision had been made of the same question in *Crew v. Pratt*, 119 Cal. 131, and in *Goldtree v. Allison*, 119 Cal. 344.

DISTRIBUTION—DECREES OF—CONCLUSIVENESS.—A decree of a court of competent jurisdiction ordering final distribution can only be attacked collaterally by proof showing that it is void: *Lowry v. McMillan*, 35 Miss. 147; 72 Am. Dec. 119, and note. It

is as conclusive, so far as the authority of that court over the subject is concerned, as a decree in chancery or the judgment of a court of law: *Slatter v. Glover*, 14 Ala. 648; 48 Am. Dec. 118. See monographic note to *Green v. Creighton*, 48 Am. Dec. 744-751, and extended note to *McPherson v. Cunliff*, 14 Am. Dec. 663-665.

**TRUSTS—POWER OF TRUSTEE TO SELL PROPERTY.**—A trustee is presumed to hold property for administration and not for sale: *Marbury v. Ehlen*, 72 Md. 206; 20 Am. St. Rep. 467. A power to sell must be found in the instrument vesting the estate in the trustee, or in some other instrument executed or assented to by him and declaring the purposes of the trust. While it is certain that such a power need not be conferred upon him in express or direct terms, but may be implied from the purposes of the trust, it is not probable that he would be conceded such power where the trust estate is conferred upon him without any declaration being anywhere made regarding the extent of his powers or the purposes of the trust: See monographic note to *Tyler v. Her-ring*, 19 Am. St. Rep. 270, 271. The determining consideration in any case is the intention of the trustor which may be enunciated clearly, or may be indicated by implication from the language used: Monographic note to *Rankin v. Rankin*, 87 Am. Dec. 209.

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## KENNEDY v. CHASE.

[119 CALIFORNIA, 637.]

**NEGLIGENCE.**—There can be no negligence without the existence of a corresponding duty.

**MASTER AND SERVANT.**—The duty of a master to furnish a safe place in which his servant is to work is limited to the premises where he is required for the purposes of his employment to be. If he goes to other parts of the premises for some object of his own, he assumes the risk arising from their dangerous condition.

**MASTER AND SERVANT—INJURY TO A SERVANT BY FALLING THROUGH A HATCHWAY WHERE HIS DUTIES DO NOT REQUIRE HIM TO BE.**—Conceding that an employé has the right to safe ingress and egress to and from the place where he is required to work, and, as incident to his employment, to remove some of his garments and leave them on the premises and to return therefor, yet if he selects a place remote from that where he is at work and is injured by falling through an open hatchway while attempting to get such garments, his master is not liable. In going so far from the place where it was his duty to work, he was no more than a mere licensee at sufferance to whom the master owed no duty.

**MASTER AND SERVANT—LICENSEE, SERVANT, WHEN BECOMES.**—A servant or employé who leaves that portion of his master's premises where his duties require him to be and goes about his own convenience, becomes a licensee, and the master's responsibility for his safety is no greater than if he were any other licensee.

Reddy, Campbell & Metson, for the appellant.

Joseph Mee, R. Percy Wright and T. H. Osmont, for the respondents.





Plaintiff went to work about 1 o'clock in the afternoon. On reaching the freight deck, instead of going direct to the porthole, he, without direction or request from anyone, walked forward to the point marked "main hatch," and left his coat on the coaming of that hatch, at "Y"; on quitting work at 6 o'clock in the evening plaintiff returned through the porthole, went again to the main hatch, secured his coat and started, as he testified, by a direct course from that point to the ladder at the after hatch to go ashore, but on his way, in some manner not made entirely clear, managed to walk into the trimming hatch, marked "A," fell through into the hold and was injured.

When plaintiff went to work it was light between decks, but <sup>640</sup> at the hour of quitting it was quite dark, but for the light afforded by a couple of candles; and as to the sufficiency of this to enable one to see his way clearly there is some conflict—several of the men who were preparing at the time to leave the vessel testifying that they could see the hatchway through which plaintiff fell, and warned plaintiff to look out for it, but plaintiff testifying that he could not see it, and heard no warning until he was falling. It did appear, however, without conflict that there was a candle held near the after hatch to light the way out.

The trimming hatch in question, like the others of its kind shown on the diagram, was a small hatchway used for putting in and trimming ballast; it was flush with the deck, without coaming, and had, like the others, been open all the afternoon, although it had not been used that day, as a part of the cargo of coal which yet remained in the forward part of the hold lay too near it; for this reason the ballast put in that afternoon had been put through hatches "B" and "D" only.

In substantial effect this was the showing made by plaintiff's evidence. It may be added that there was some slight discrepancy between the testimony of the plaintiff and that of his other witnesses as to the correctness of the diagram referred to, particularly as to the location of the porthole at which the lighter lay—the plaintiff being inclined to locate it about equidistant between the main and after hatches; but, if the fact be material, his testimony shows such uncertainty and apparent confusion in this, and one or two other respects relative to the situation of physical objects on the deck, and is so entirely overborne by the testimony of all his other witnesses on the subject, that it may be said to appear without substantial conflict that the diagram correctly shows, approximately, the relative positions of the various objects designated thereon, including the porthole.

This evidence shows no negligence on the part of defendants, and the nonsuit was properly granted on that ground. There cannot be neglect without the existence of a corresponding duty, and under the circumstances shown it is clear that defendants were under no legal duty or obligation to protect plaintiff from the injury he received. While an employer is required to furnish his servant with a reasonably safe place in which to work, this duty is limited to the premises where the employé is required, <sup>641</sup> for the purposes of his employment, to be; it does not extend to his protection while upon private excursions outside of those limits, taken solely on his own account. Plaintiff's work was upon the lighter, and it may be conceded that he had a right of safe ingress thereto and egress therefrom; but in going forward to the main hatch plaintiff was not within the reasonable exercise of any right which he had on board the ship by reason of his employment. Conceding his privilege, as incident to his employment, to remove and deposit his coat while working, and to be protected while in the reasonable exercise of such right, it was neither reasonable nor necessary to select for the purpose a point so remote from his work. He had as well chosen to hang his coat in the rigging, or at the yardarm. No reason appears why he could not, like others of his fellow laborers, have laid the garment on the lighter, or in some place more convenient to the place of his employment, or the point of departure from the ship. His duty required him to leave the ship by as direct a route as practicable; he had no general right on board, but solely a right for the purposes of his special employment. In going where he did he not only went entirely out of his way, but was in pursuit of an object relating solely to his own personal convenience; and while, perhaps, not in strictness a trespasser, he was at best but a mere licensee at sufferance, to whom the defendants at the time owed no duty.

An employé who leaves that portion of his master's premises where his duties require him to be, and goes about to his own convenience, becomes a licensee: *Wright v. Rawson*, 52 Iowa, 329; 35 Am. Rep. 275; *Pfeiffer v. Ringler*, 12 Daly, 437. The same doctrine is recognized in *Kauffman v. Maier*, 94 Cal. 269, 278.

It is conceded that the evidence does not show any employment of plaintiff by the owners of the vessel, but it is claimed that, plaintiff being lawfully upon the ship, it was the duty of the owners, for a neglect of which they are responsible, not to leave unguarded holes upon the deck—upon the principle that



the owner of premises is responsible to one coming thereon, by his invitation, for injury occasioned by their unsafe condition, and from a cause which could have been avoided by reasonable care.

<sup>642</sup> But this principle, like that governing the responsibility of an employer, has its limitations. The duty of the owner in such a case has relation to the object for which the right of entry is extended, and is limited to responsibility for the condition of that portion of the premises required for the purposes of the visit; it does not impose liability for the want of safety at a point without those limits, and where the injured party was neither invited nor expected to go: 1 Thompson on Negligence, c. 7, p. 308; Zoebisch v. Tarbell, 10 Allen, 385; 87 Am. Dec. 660; Murray v. McLean, 57 Ill. 378; Schmidt v. Bauer, 80 Cal. 565.

When the defendant owners permitted the plaintiff to go aboard the ship for a specific purpose, they did not give him the right, by implication, or otherwise, to roam at will over their vessel for his own purposes. They undertook that their decks should be reasonably safe where plaintiff was required by his employment to traverse them, but not elsewhere.

"We have found no support for any rule," says Mr. Thompson, in speaking of the rights of trespassers or mere licensees, "which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or their relations with the occupant": 1 Thompson on Negligence, 303. See, also, Redigan v. Boston etc. R. R. Co., 155 Mass. 44, 47; 31 Am. St. Rep. 520, and cases there cited.

The circumstances clearly distinguish this case from those relied upon by appellant. In all those cases it will be found that the injury was received while the party was engaged in the performance of his work, or in a place where he had a right at the time for the purposes of his employment to be.

Judgment affirmed.

Harrison, J., and Beatty, C. J., concurred.

Hearing in Bank denied.

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NEGLIGENCE—NECESSITY OF FAILURE OF DUTY.—Negligence is the failure to exercise such care, prudence, and forethought as duty, under the circumstances, requires should be given or exercised: Brotherton v. Manhattan Beach Imp. Co., 48 Neb. 563; 58 Am. St. Rep. 709, and note. An action for negligence does

not lie unless the defendant was under some duty, not performed, to the party injured at the time and place where the injury was inflicted: *Daugherty v. Herzog*, 145 Ind. 255; 57 Am. St. Rep. 204, and note.

**MASTER AND SERVANT—DUTY TO FURNISH SAFE PLACE TO WORK—HOW LIMITED.**—An employé in a coal mine left the room where he was at work and went to another, according to custom, to visit some other employés there at work, and while there the roof fell in by reason of the decay and insufficiency of the supports and killed him. His representatives were not allowed to recover for his death because, having left his proper working place and gone to a room to which no duty to his master, but rather his own pleasure, called him, he was in no better position than that of a licensee: *Wright v. Rawson*, 52 Iowa, 329; 35 Am. Rep. 275. Compare with the principal case, *Parkinson Sugar Co. v. Riley*, 50 Kan. 401; 34 Am. St. Rep. 123, and note; *Broderick v. Detroit Union Depot Co.*, 56 Mich. 261; 56 Am. Rep. 382.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**FLORIDA.**

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**DOYLE v. STATE.**

[39 FLORIDA, 155.]

**RAPE—INSTRUCTION CONTAINING MATTER OF ARGUMENT.**—It is not a rule of law that the jury must view rape as a most heinous offense calculated to create prejudice against the accused, nor that rape is, as a matter of law, an accusation easy to make and hard to be defended by the accused. This is matter of argument but not of instruction.

**RAPE—COERCION WITHOUT FORCE.**—If by an array of physical force, without laying hands on a woman, a man so overpowers her that she dare not resist, her consent is void and his carnal intercourse is rape.

**RAPE.—INSTRUCTION** as to the condition of prosecutrix at time of rape is a charge on the weight of evidence and erroneous. This is matter for the jury to determine from the evidence.

**RAPE—CONVICTION ON UNCORROBORATED TESTIMONY OF PROSECUTRIX.**—The jury may convict the accused of rape on the uncorroborated testimony of the prosecutrix.

**RAPE—EVIDENCE OF PROSECUTRIX.**—It is error to instruct the jury in prosecutions for rape that the evidence of the prosecutrix must be received with more than ordinary doubt and suspicion.

**JURY TRIAL—SUFFICIENCY OF EVIDENCE.**—The jury are the sole judges of the sufficiency of the testimony and the veracity of the witnesses, and unless there is evidence that the jury was improperly influenced, the court will not reverse the decision on the ground of insufficiency of evidence.

The plaintiff in error was convicted of rape. The prosecutrix testified that defendant, an utter stranger, on August 19, 1895, came to her house, and after some talk solicited her to sexual intercourse and she told him to go away; he offered her five dollars and she refused; that defendant then began cursing, drew a knife and threatened to kill her if she did not sub-



mit; that she laid down on the bed and defendant cursing and threatening to kill her pulled up her dress and penetrated her; that defendant, when through, said he would kill her if she told. Prosecutrix recognized defendant though she had not seen him since the assault until he was arrested and brought before her the following December. The prosecutrix was not interrogated as to any resistance on her part; nor as to any complaints made after the occurrence, nor as to any other matters connected with the crime, or her conduct at the time of or after the commission. Defendant was arrested in December, 1895, and when arrested asked if he was wanted for something at Baldwin. Defendant testified that he was not in Baldwin in August, 1895; that he lived in Savannah, Georgia; that he never saw the prosecutrix until he was arrested and brought before her in December, 1895. Defendant exhibited his foot which had the big toe and the one next to it gone. He also exhibited scars on his face. Depositions of six parties were read for the defense, all of whom claimed to be able to identify defendant, and deposed that he was in Savannah, Georgia, on August 19, 1895, or about that time. Some deposed as to the absence of the toe, others as to the scars on the face. Two witnesses in rebuttal, testified that they had known defendant two or three years, and that they saw him in Baldwin on August 14, 1895. One witness had conversed with him on that day. The court refused the following instructions requested by the defendant: 1. The charge made against defendant is in its nature a most heinous one, and well calculated to create strong prejudice against the accused, and the attention of the jury is directed to the difficulty, growing out of the nature of the usual circumstances of the crime, in defending against the accusation of rape. Voluntary submission on the part of the woman, while she has power to resist, no matter how tardily given or how much force had theretofore been used, does not constitute rape. 2. Prosecutrix being in full possession of natural mental and physical power, and not terrified by threats, or in such a position that resistance would be useless, it must appear that she resisted to the full extent of her ability; otherwise it is not rape. 3. Unless you are satisfied beyond any reasonable doubt that she did not, during any part of the act, yield her consent you must acquit. 4. I charge you that this is an accusation easy to make, and hard to be defended by the accused, though he be never so innocent, and hence the law is that you should receive with more than ordinary doubt and suspicion the evidence of the prosecutrix. 5.

I further charge you that if, upon considering the whole evidence, including the evidence contained in the depositions, there remains a reasonable doubt in your minds as to whether this prisoner was not only in Duval county at the time of the commission of this offense, but also that he forcibly and against the consent of the prosecutrix, carnally knew her, then you must acquit. 6. I warn you against conviction on the unsupported testimony of the prosecutrix. Unsupported testimony is not sufficient to convict.

R. S. & P. D. Cockrell, for the plaintiff in error.

Wm. B. Lamar, attorney general, for the defendant in error.

**160** CARTER, J. The trial court was justified in refusing the first as well as the fourth instruction, because the first sentence of each instruction announced matters of argument merely, and not principles of law. The court may, and should whenever necessary, in all criminal trials, caution the jury against convictions from prejudice or upon insufficient evidence; but it is not a rule of law that the jury must view the offense of rape as a most heinous one, or one well calculated to create strong prejudice against the accused; or that the attention of the jury be specially directed to the difficulty growing out of the usual circumstances of the crime in defending against rape; nor is it a rule of law that rape is an accusation easy to make, and hard to be defended by an accused, though he be never so innocent. In the case of *Crump v. Commonwealth* (Va., Dec. 5, 1895), 2 Fed. & St. Cr. Rep. 433, 37 S. E. Rep. 760, it is said that instructions of this nature are merely statements of the conclusions of the judicial mind from experience in the trial of this class of offenses rather than enunciations of principles of law, and that the oft-repeated observation of Lord Hale, included in the fourth instruction was entirely proper by way of argument to the jury, but not as an independent instruction of law from the court: *People v. Barney*, 114 Cal. 554.

The third instruction is also erroneous, because it requires a greater degree of resistance upon the part of a woman than the law and common sense demand where the offense is accompanied as in this case, with an exhibition of weapons and threats, calculated to **161** produce in the mind of the woman a reasonable fear of death or great bodily harm in case of resistance. Consent of the woman from fear of personal violence is void, and though a man lays no hands on a woman, yet if by an array of

physical force, he so overpowers her that she dares not resist, his carnal intercourse with her is rape: 2 Bishop's Criminal Law, sec. 1125; Rice v. State, 35 Fla. 236; 48 Am. St. Rep. 245; Clark's Criminal Law, 188; Felton v. State, 139 Ind. 531. This instruction, utterly ignored the rule dispensing with resistance under such circumstances, and although the principles therein stated might be applicable to a case where no exhibition of weapons and threats to use them were shown in evidence, they are not correct when applied to the facts of this case, and the court properly refuses to give them: Felton v. State, 139 Ind. 531; Huston v. People, 121 Ill. 497.

The second instruction was also erroneous because it was a charge upon the weight of the evidence. By it the jury were told that prosecutrix was at the time of the alleged rape in possession of her natural mental and physical power, and not terrified by threats, or in such a position that resistance would be useless. All these were matters for the jury to determine from the evidence, and the court by giving the instruction would have taken these questions from the jury and confined the jury to the sole question whether prosecutrix resisted to the full extent of her ability: Giles v. State, 83 Ga. 367.

The fourth and sixth instructions were properly refused. Both of them, when applied to the facts of <sup>162</sup> this case, told the jury that, as a matter of law, the defendant could not be convicted upon the uncorroborated testimony of the prosecutrix. In several states such a rule is expressly enacted by statute, and in one or two others the courts have held this to be the law independent of statute. But the weight of authority, and better reason in the absence of statute, is that there is no law limiting the powers of the jury to convict on the uncorroborated testimony of the prosecutrix: 2 Bishop's Criminal Procedure, sec. 968; Boddie v. State, 52 Ala. 395; Barnett v. State, 83 Ala. 40; Monroe v. State, 71 Miss. 196.

The fourth instruction stated the law to be that a jury should receive with more than ordinary doubt and suspicion the evidence of the prosecutrix in prosecutions for rape. As without the testimony of the prosecutrix no conviction could have been had in this case, and the court charged the jury that they must give defendant the benefit of all reasonable doubts, it is apparent that had the court given this instruction, the whole controversy would have been resolved into this proposition; the defendant is entitled to the benefit of all reasonable doubts: his guilt is proven only by the prosecutrix; her testimony must be re-



ceived with extraordinary doubt and suspicion, therefore defendant is entitled to a verdict. If in any case it is proper for the court to instruct the jury that they should scrutinize the testimony of the prosecutrix with caution, no authority can be found to sustain the proposition that such testimony must, as a matter of law, be received with more than ordinary doubt and suspicion: *Monroe v. State*, 71 Miss. 196; 2 *Bishop's Criminal Procedure*, sec. 968; 3 *Greenleaf* <sup>163</sup> on Evidence, sec. 212. The judge has no power to instruct the jury as to the weight of evidence, but only as to the rule: *Williams v. Dickenson*, 28 Fla. 90.

The fifth instruction was fully covered by the general charge of the court, and was therefore properly refused.

We are asked to reverse the judgment in this case upon the ground that the evidence is insufficient to sustain the verdict. In *Sherman v. State*, 17 Fla. 888, it is said: "We do not think we ought to interpose our judgment, even if we differed with the jury in their conclusions. The rule is otherwise unless we can discover some evidence that the jury was improperly influenced. As to the sufficiency of this testimony and the veracity of the witnesses, the jury were the sole judges," and this rule is binding upon us. The court below charged the jury very favorably for the accused. The jury were instructed, among other things, that the presumption of innocence accompanied the defendant through each step of the trial as to each material allegation, and the presumption obtained until overcome by evidence establishing guilt beyond a reasonable doubt; that the evidence must convince the minds of the jury beyond reasonable doubt of the identity of the prisoner with the person who it was claimed committed the crime, and that the prisoner did against the will of the prosecutrix, and by force, have carnal knowledge of her person, or by threats and fear of death or great bodily harm, overcame any resistance upon her part, and that a reasonable doubt as to the identity of the prisoner, or on the question of force, or its equivalent, fear of bodily harm, or death or duress, would entitle the prisoner to an acquittal. <sup>164</sup> No exception was taken to any portion of the charge or any ruling upon evidence. The judge who presided at the trial, not only approved the verdict by refusing a new trial, but imposed the heaviest penalty known to the law upon the defendant, although the statute left it discretionary with him to impose a lighter sentence. The jury whose province it was to pass upon the testimony thought the proof so clear that they failed to embody

a recommendation to mercy in their verdict. While the testimony of the prosecutrix might have been more lengthy in details, and therefore more satisfactory to those minds which shudder at taking human life for a crime sometimes so hard to defend against as rape, yet the testimony of this woman, who is not shown to be of bad character for veracity or chastity, and who was an utter stranger to defendant, and therefore not apt to be influenced by motives of animosity toward him, seems to have been given in a spirit of truth and sincerity, and we are not justified in saying it is untrue, when twelve jurors, whose province it was to pass upon it, have said it was credible, and when their verdict has received the sanction and approval of the judge who presided at the trial.

The judgment is, therefore, affirmed.

**RAPE—FORCE NECESSARY.**—Though a man lays no hands on a woman, yet if by an array of physical force he so overpowers her that she dares not resist, his carnal intercourse with her is rape: *Rice v. State*, 35 Fla. 236; 48 Am. St. Rep. 245, and note. Compare *Whittaker v. State*, 50 Wis. 518, 36 Am. Rep. 856, holding that such intercourse may not be rape.

**RAPE—UNCORROBORATED TESTIMONY OF PROSECUTRIX.**—The rule requiring the testimony of an accomplice to be corroborated does not apply in a prosecution for the crime of carnally abusing a female person under the age of consent: *Bond v. State*, 63 Ark. 504; 58 Am. St. Rep. 129. See *State v. Wilcox*, 111 Mo. 569; 33 Am. St. Rep. 551. For a general treatment of rape, see monographic note to *Smith v. State*, 80 Am. Dec. 361-375.

**RAPE—INSTRUCTIONS.**—On a trial for rape, where the evidence conflicts as to the amount of resistance offered and force used, the prejudice likely to be aroused against the defendant by the heinous nature of the charge, and the difficulty in defending against it, should be pointed out to the jury: *Reynolds v. State*, 27 Neb. 90; 20 Am. St. Rep. 659.

**APPEAL—SUFFICIENCY OF EVIDENCE.**—If there is sufficient conflict in the evidence to put the determination of the issue within the province of the jury, the verdict cannot be disturbed on appeal on the ground of the insufficiency of the evidence to sustain it: *Warner v. Southern Pac. Co.*, 113 Cal. 105; 54 Am. St. Rep. 327, and note; unless the conclusion of the jury is clearly wrong: *Atkins v. Field*, 89 Me. 281; 56 Am. St. Rep. 424, and note.

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## BRANDIES v. PERRY.

[89 FLORIDA, 172.]

**HOMESTEAD—LAND APART FROM THE HOME TRACT.** The head of a family cannot hold as a part of his homestead a detached tract of land used and cultivated as a part of the home farm, though both tracts do not in quantity exceed the limit allowable for a homestead.

Appellant, through sheriff, levied execution on about seventy-five acres of land, belonging to appellee and claimed by appellee

as part of his homestead and advertised the same for sale. Appellee was the head of a family residing on a four acre lot about four hundred yards from the above mentioned seventy-five acres and separated from them by other tracts of land not owned nor occupied by appellee. The said tract of seventy-five acres was used and cultivated as part of the homestead and both tracts did not exceed the constitutional limit as to quantity. Appellee filed a bill in equity praying that the land levied upon be set apart as a part of appellee's homestead, and for a temporary and permanent injunction against the proposed sale. A temporary injunction was granted. Appellant moved the dissolution of the injunction and the dismissal of the bill for want of equity. The court refused the motion and from this order appellant appealed.

Horatio Davis, for the appellant.

**174** CARTER, J. The bill fails to show whether the two tracts of land mentioned, or either of them, are located within the limits of an incorporated town, but assuming that they are not, the question arises, can the head of a family residing in this state claim as a part of his homestead a detached tract of land, used and cultivated as a part **175** of the home farm, where both tracts do not exceed in the aggregate the limit of one hundred and sixty acres. Mr. Thompson says the weight of authority is against such claim: Thompson on Homesteads and Exemptions, sec. 145. See, also, Linn County Bank v. Hopkins, 47 Kan. 580; 27 Am. St. Rep. 309; McCrosky v. Walker, 55 Ark. 303; Waples on Homestead and Exemption, 153. It is apparent, however, that the question must largely depend upon the language of the statute or constitution giving the right of homestead exemption, and this language varies in the different states. The right is given in this state by section 1, article 10, constitution of 1885, which, in so far as it applies to homesteads outside of incorporated cities or towns, provides as follows: "A homestead to the extent of one hundred and sixty acres of land, . . . owned by the head of a family residing in this state, . . . and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists." This language is practically the same as used in the constitution of 1868; and it had been several times construed by this court prior to its incorporation into the present constitution of 1885. Thus, in



*Baker v. State*, 17 Fla. 406, it was held that the actual ownership of real estate and its occupation by the head of the family and his family, impressed it with the homestead character. In *Solary v. Hewlett*, 18 Fla. 756, and *Drucker v. Rosenstein*, 19 Fla. 191, it was held that actual occupation of real estate as a home of the family was necessary to constitute such land a homestead, exempt from forced sale under process against <sup>176</sup> the head of such family. In the case of *Oliver v. Snowden*, 18 Fla. 823, 43 Am. Rep. 338, it was held that a party residing in an incorporated town or city with his family, and owning land several miles from the town, cannot claim the latter as exempt from forced sale as a homestead, it having never been occupied by him as a residence. In that case the question here involved, viz., whether two separate tracts of land outside of a city or town, may be treated as a homestead, the residence being upon one of them, and the other used as a part of the same farm, was stated, but not decided. It was there held, however, that the homestead meant by our constitution was the home place; the place where the home is; the house and adjoining land where the head of the family dwells; the home farm; the land where is situated the dwelling of the owner and his family. It was therein stated that "if the homestead, the place of residence of the debtor and his family, is in the town or city, the claim of exemption of rural lands cannot be allowed. It is only the 'place of the home' of the debtor and family that can be exempt from sale for debts." From this definition of a homestead, it is evident that the framers of our constitution had in mind, not an exemption of a given quantity of land for the benefit of a debtor, but, the protection from forced sale of the family home for the benefit of the debtor and his family. This view is emphasized by the language, "a homestead, to the extent of one hundred and sixty acres of land," meaning a family home place to the limit, size, or bulk of one hundred and sixty acres. This being the plain meaning of the language used, it is clear that a separate tract of land never occupied by the family and its head as a home cannot be exempt from forced sale, unless it can be <sup>177</sup> inferred that by reason of its use as a part of the same farm with the actual home place, it becomes a part thereof for homestead purposes. There is no language in the constitution to warrant such an inference. We said in *McDougall v. Meginniss*, 21 Fla. 362, 369: "When a party resides on the land as a homestead, and the law is silent as to how much of said land, other than that occupied by his house, he shall use

or cultivate, or in what manner he shall use it, or that he shall use or cultivate it at all, we do not feel at liberty to amend the constitution of the state by the interpolation of further provisions therein, regulating the manner or extent of the use of the homestead, or declaring that a nonuser of a part while he remains on the land is an abandonment of that part which takes from it the benefit of the homestead exemption. In our view the owner is only required by the constitution to live on the land, and the whole one hundred and sixty acres is exempt." The use of land for homestead purposes, other than an actual bona fide residence thereon as a home for the occupant and his family, is no test by which to ascertain if it is exempt, because it is not made such by the constitution; neither can its use in connection with, make it a part of, the tract upon which the home is located, where the two tracts are entirely separate and distinct. According to the allegations of the bill the appellee did not with his family reside upon the tract of land levied upon; but upon a different tract separated from the one levied upon by other tracts of land neither owned nor occupied by appellee.

There was no equity in the bill, and the injunction should have been dissolved.

**178** The decree of the court below is reversed, with directions to dissolve the injunction, and, unless appellee desires to amend, to dismiss the bill of complaint.

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**HOMESTEAD—NECESSITY OF ACTUAL OCCUPANCY.**—The principal case is in accord with the weight of authority which holds that there must be both possession and occupancy of the premises in order to stamp them with the character of a homestead, but upon this question there is a conflict of authority: *Note to Mason v. Columbia Finance etc. Co.*, 59 Am. St. Rep. 452; *Turner v. Turner*, 107 Ala. 465; 54 Am. St. Rep. 110, and note. But compare *Hodges v. Winston*, 95 Ala. 514; 36 Am. St. Rep. 241, and note; *Maloney v. Hefer*, 75 Cal. 422; 7 Am. St. Rep. 180.

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## HAGAN v. ELLIS.

[89 FLORIDA, 463.]

**ADVERSE POSSESSION IS COMPUTED FROM THE DATE OF THE PATENT** issued by the state or by the United States and not from the date of entry.

**EJECTMENT.—EQUITABLE ESTOPPELS** are proper defenses in ejectment and are admissible under the plea of not guilty.

**EQUITABLE ESTOPPEL—FORCE OF.**—Where plaintiff held equitable title for thirty years without asserting his claim and then his equitable title is converted into a legal title, he being estopped from asserting his equitable title is also estopped from asserting his legal title.

In 1893, defendant in error instituted in the circuit court of Holmes county an action in ejectment against plaintiffs in error, to recover possession of lots Nos. 1, 2, and 3 of section 20, township 7, north of range 14 west. Defendants pleaded not guilty; upon which issue was joined and a trial had resulting in a verdict and judgment for plaintiff. From this judgment a writ of error was taken. The evidence was to the following effect: In 1854 or 1855 the land sued for was entered by plaintiff in the United States land office under the "Graduation Act." He then paid all the purchase money and received a certificate from the government to this effect. In 1861 or 1862 plaintiff sold the land to one T. Day, and gave him the certificate of purchase and bond for title. Plaintiff had never been in possession of the land since he sold it to Day, nor did plaintiff ever claim the land thereafter until he received his patent for it in 1891. Plaintiff paid no taxes on the land from the time he sold it to Day until within two years of the trial. Plaintiff secured his patent without paying any more money than when he entered the land. Day sold the land to one Loftin, Loftin to one Hicks, Hicks to one Pate, and Pate to defendant Calvin Hagan, all of whom went into possession of the land. Defendants purchased it ten or fifteen years previous to the trial and had improved and cultivated it. Plaintiff knew that purchasers were in possession, but made no claim to the land until a short time before suit was brought. Plaintiff had told several parties that he sold the land to Day and had no claim to it. At plaintiff's request the court instructed the jury: "If you find from the evidence that the plaintiff in this case acquired title by patent from the United States government within less than seven years before the commencement of this action, then the defendants cannot set up title by adverse possession against the title of the plaintiff." The following instructions of the defendants were refused and exceptions made to the ruling: "2. If you believe from the evidence that the defendants or those through whom they claim, that is, any of the previous owners through whom the defendants claim, had a written title to it, entered into possession of the land under claim of title, exclusive of any other right, and there had been a continued occupation and possession of the land by the defendants, or those through whom they claim, for seven years previous to the institution of this suit, they were holding adversely to the plaintiff, and you will find for the defendant. 5. A man cannot sleep over his rights for a long period of time, when he has a legal right to enforce them, until innocent parties



become involved, and then enforce his rights in the courts, so if you believe that the plaintiff for thirty years stood by and saw other parties claiming title to the lands in question, cultivating and improving them thirty or more years, where there was no impediment to his bringing suit to recover them, and during that time made no claim to the lands, his claim becomes stale, and cannot recover the lands, although he may have the legal title to it." The defendants moved for a new trial on the ground that the verdict for plaintiff was contrary to the law and the evidence. The plaintiffs in error contend that the court erred in giving the special instruction for the plaintiff, in refusing the special instruction on behalf of the defendants and in overruling the motion for a new trial.

D. L. McKinnon, for the plaintiff in error.

W. O. Butler, for the defendant in error.

469 CARTER, J. 1. The court very properly gave the instruction requested by the plaintiff, and refused the second instruction requested by the defendants. Plaintiff purchased these lands from the United States in 1854 or 1855, and received a certificate of purchase and full payment, but no patent was issued upon his entry until 1891. During the period intervening between the entry and the issue of the patent, the plaintiff was the beneficial or equitable owner of the lands, and the United States was the holder of the legal title. Upon the theory that the entryman in such cases is the real owner of the property from the time that he has complied 470 with all conditions entitling him to a patent, some of the state courts hold that adverse possession will begin to run against the entryman from the time he becomes entitled to a patent, and not from the date of the patent. An illustration of this view will be found in *Dolen v. Black*, 48 Neb. 688. On the other hand, the supreme court of the United States has held, in a case very similar to the one at bar, that time does not run against the government; that no statute of limitation affects the rights of the government unless there is an express provision to that effect; that so long as the legal title is in the United States, limitation by adverse possession cannot commence to run, and, therefore, in all actions of ejectment in the United States courts, adverse possession under state statutes will be computed from the date of the patent, and not from the date of the entry: *Redfield v. Parks*, 132 U. S. 239. It is unnecessary for us to express an opinion as to the merits of these con-

flicting views, because in the statute giving a limitation by adverse possession, under which it is claimed by plaintiffs in error that the instruction given was bad, and the one refused good (ch. 1869, approved February 27, 1872), there is an express declaration that the cause of action commences to run in such cases from the date of the patent, by section 3, reading as follows: "No cause of action or defense to an action founded upon the title to real property, or to rents, or to service out of the same shall be effectual unless it appear that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person was seised or possessed of the premises in question <sup>471</sup> within seven years before the accruing of the right of action or defense in respect to which such action is prosecuted or defense made, or unless it appear that the title to such premises was derived from the United States or the state of Florida within seven years before the commencement of such action, and the cause of action shall not commence to run until the date of the patent issued by the state or the United States." The circuit court was carrying out the plain language and meaning of this section in its rulings upon the instructions complained of, and consequently committed no error.

2. The refusal of the fifth instruction requested by defendants, and the denial of their motion for a new trial, will be considered together. These rulings involve the questions: A. Whether, in ejectment, the defendant can avail himself of an equitable estoppel to defeat plaintiff's right of recovery upon a legal title; B. Whether an estoppel of this character can avail under a plea of not guilty; and C. Whether the evidence in this case was such as to require the court to give the fifth instruction requested by defendants, and to grant a new trial upon the ground that the verdict was contrary to the law and the evidence.

A. In several of the states where common law and equity remedies are separate and distinct, equitable estoppels cannot avail a defendant in ejectment, unless, perhaps, by equitable plea, where such pleas are allowed: Sedgwick and Wait on Trial of Title to Land, sec. 849; Newell on Ejectment, p. 675, sec. 47. In others, such estoppels are available in ejectment, as well as in other common-law actions: Sedgwick and Wait on Trial of Title to Land, sec. 849; Newell on Ejectment, p. 675, sec. 48; Bigelow on Estoppel, <sup>472</sup> 682, et seq. This court has frequently applied the doctrine of estoppel in ejectment suits,

and indirectly recognized such defenses as applicable to such actions, although, so far as we have been able to find, it has never passed directly upon the question now under consideration. Thus, in *Coffee v. Groover*, 20 Fla. 64, we held that special pleas affecting the legal title or in estoppel should be stricken out, because the plea of not guilty was broad enough to cover them; in *Levy v. Cox*, 22 Fla. 546, we reversed a judgment in ejectment because the jury failed to give plaintiff the benefit of an equitable estoppel shown in evidence; in *Coogler v. Rogers*, 25 Fla. 853, we reversed a judgment in ejectment because the jury had failed to give defendant the benefit of an equitable estoppel shown in evidence; and in *Watrous v. Morrison*, 33 Fla. 261, 39 Am. St. Rep. 139; the principles applicable to an equitable estoppel in evidence in that case were stated and applied. In the United States courts, where common law and equity jurisdiction and remedies are still clearly and sharply defined, equitable estoppels are proper defenses in ejectment (*Dickerson v. Colgrove*, 100 U. S. 578, and *Kirk v. Hamilton*, 102 U. S. 68, followed by the circuit court of appeals in *Berry v. Sewall*, 65 Fed. Rep. 742; 13 C. C. A. 101); and we hold them so to be in this state.

B. In *Coffee v. Groover*, 20 Fla. 64, 78, we held that a special plea of *res adjudicata* (an estoppel by record) in ejectment should be stricken by the court *sua sponte*, or on motion or demurrer, holding that special pleas of matter affecting the legal title, or in estoppel only, encumbered the record and tended to embarrassment, as all such matters were admissible under the plea of not guilty. We think the same <sup>473</sup> rule applies to equitable estoppels, and that they are admissible under the plea of not guilty: *Tyler v. Hall*, 106 Mo. 313; 27 Am. St. Rep. 337; *Mayer v. Ramsey*, 46 Tex. 371.

C. In *Hollingsworth v. Handcock*, 7 Fla. 338, we held that a party who negligently and culpably stands by and allows another to contract on the faith of an understanding of a fact which he can contradict, he cannot afterward dispute that fact in an action against the person whom he had assisted in deceiving: *Camp v. Mosely*, 2 Fla. 171, 197. In *Levy v. Cox*, 22 Fla. 546, we held that when a party claiming land for which he has not received a conveyance, voluntarily directs a deed to be made to another person, he is thereby estopped from asserting title thereto as against an innocent purchaser thereof by regular conveyance from the sole heir of the person in whose name the deed was made. In *Coogler v. Rogers*, 25 Fla. 853, we held that



an equitable estoppel would arise in all cases where one, willfully, culpably, or negligently, either by words or admissions, or by conduct, acts, and acquiescence, separately or combined, caused another person to believe in the existence of a certain state of facts, by which such other person was induced to act, so as to change his own previous position injuriously. Equitable estoppel, so far as it relates to the trial of title to land, is stated by Sedgwick and Wait on Trial of Title to Land, section 843, to be "a doctrine by which a party is prevented from setting up his legal title, because he has through his acts, words, or silence led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience": *Terrell v. Weymouth*, 32 Fla. 255; 37 Am. St. Rep. 94. In *Dickerson v. Colgrove*, 100 U. S. 474 578, Mr. Justice Swayne says: "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted." In *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344, Chancellor Kent said: "If one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterward be permitted to exercise his legal right against such person." And this principle, though often restated, has perhaps never been more clearly and succinctly given than in this language by Chancellor Kent; and it has been many times quoted and approved by judges and text-writers: *Neal v. Gregory*, 19 Fla. 357; *Blodgett v. McMurtry*, 34 Neb. 782; *Wahl v. Pittsburg etc. Ry. Co.*, 158 Pa. St. 257; *Duke v. Griffith*, 9 Utah, 469; *Mayer v. Ramsey*, 46 Tex. 371; 3 Kerr on Real Property, 2302; *Bigelow on Estoppel*, 547; 2 Rice on Evidence, 724; 6 Lawson's Rights, Remedies, and Practice, sec. 2701; 2 Pomeroy's Equity Jurisprudence, sec. 818; *Tiedeman on Equity Jurisprudence*, sec. 115; *Wood on Limitations*, sec. 61.

Viewed in the light of these principles, it is difficult to conceive of a stronger case of equitable estoppel than that furnished by the plaintiff's own sworn admissions in this case. Selling the land and delivering possession thereof to Day in 1861, though under a mere bond for title, he for thirty years thereafter, stood by and saw those tracing title from Day, purchase, claim, possess, and improve the property, under 475 the belief, and some with positive assurances, that plaintiff claimed no title to the property, and during all these years the plaintiff made no claim

to the property, though living as a neighbor to the occupiers thereof. True it is, that the patent, which invested plaintiff with the legal title to this land, did not issue until 1891, at which time plaintiff, for the first time after selling to Day, asserted a claim to the land; but it is a clear proposition that while the naked legal title was in the United States until the patent issued, the beneficial ownership or equitable title to the land was in the plaintiff from the year 1854 or 1855, when the government issued to him a certificate of purchase, showing full payment therefor: *Witherspoon v. Duncan*, 4 Wall. 210; *Cornelius v. Kessel*, 128 U. S. 456; *Wisconsin Cent. R. R. Co. v. Price County*, 133 U. S. 496; *Freeman on Executions*, sec. 176; *Tiedeman on Real Property*, sec. 746; *Mundee v. Freeman*, 23 Fla. 529. The patent being based solely and exclusively upon the original entry, without any new or other consideration, did not convey to plaintiff a new or independent title, disconnected with his former equitable title, but rather converted that which was before imperfect and equitable merely, into a perfect legal title, enabling plaintiff to seek and maintain legal remedies where theretofore he was, in the absence of statute, confined to equitable ones. Consequently the plaintiff being estopped from asserting his equitable title to the lands in controversy, we think the estoppel likewise extends to the legal title subsequently vesting in him by virtue of the patent.

The court erred in refusing the fifth instruction requested <sup>476</sup> by defendants, and in overruling the motion for a new trial.

The judgment is reversed and a new trial granted.

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**ADVERSE POSSESSION—WHEN BEGINS.**—The statute of limitations begins to run in favor of the party in possession only from some act of possession so open, notorious, and hostile that it constitutes in law notice to the real owner: *Smeberg v. Cunningham*, 96 Mich. 378; 35 Am. St. Rep. 613, and note. But constructive possession arises when a person has the paramount title which in contemplation of law draws to and connects with it the possession: *Morrison v. Kelly*, 22 Ill. 610; 74 Am. Dec. 169. See monographic note to *De Frieze v. Quint*, 28 Am. St. Rep. 158-162.

**EJECTMENT—EQUITABLE ESTOPPEL AS DEFENSE—PLEADING.**—Equitable estoppel is a defense available at law as well as in equity: *Dickerson v. Board of Commrs.*, 6 Ind. 128; 63 Am. Dec. 373. Equitable estoppel as to title to land is such conduct as prevents a party from setting up his legal title because he has, through his acts, words, or silence, led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience: *Terrell v. Weymouth*, 32 Fla. 255; 37 Am. St. Rep. 94, and note. An estoppel may be given in evidence in ejectment under the general issue in *New York: Wood v. Jackson*, 8 Wend. 9; 22 Am. Dec. 603. See *McKay v. Williams*, 67 Mich. 547; 11 Am. St. Rep. 597.

## STATE v. HOCKER.

[39 FLORIDA, 477.]

**AN OFFICE IS** a public charge or employment. The duties of the employment must be continuing, and prescribed by law, and not by contract. Emolument, though a usual, is not a necessary element of an office.

**OFFICERS — PUBLIC, WHO ARE.—MEMBERS OF A STATE BOARD OF LEGAL EXAMINERS**, required to be appointed by the supreme court of the state, and whose tenure of office is fixed by a statute which also imposes on them the duty of examining all applicants for admission to the bar of the state respecting their intellectual, moral, and professional qualifications and of granting to such applicants certificates of admission to such bar, are public officers.

**OFFICE—APPOINTMENT TO—WHO MAY EXERCISE POWER OF.**—Under a constitution authorizing the legislature to provide for officers to be elected by the people or appointed by the governor, a statute purporting to authorize the appointment by the supreme court of a state board to examine and grant certificates to applicants for admission to the bar of the state, is unconstitutional and void.

S. L. Carter, for the relator.

E. J. L'Engle and W. A. Hocker, for the respondent.

**479** TAYLOR, C. J. Lee J. Clyatt, by his petition for *mandamus* filed as an original proceeding in this court, alleged that he was over the age of twenty-one years and a resident and citizen of Alachua county, in the fifth judicial circuit of Florida, of which judicial circuit the respondent is the presiding judge. That on the ninth day of July, A. D. 1897, at Ocala, in Marion county, within said judicial circuit, he applied by petition to the respondent, as judge, for admission to the bar of said circuit court, and submitted with said petition satisfactory evidence that he was twenty-one years of age and of good moral character, and thereby prayed the said judge that he, the said judge, should examine into his qualifications, or require such examination to be made by two members of the bar of said court, and if found to be qualified that he, the said judge, should grant to him a license to practice law in the several courts of the state of Florida, according to the provisions of rules 1 and 2 of the rules of practice for the government of the circuit courts in common-law actions; but that the said judge then and there refused, and still refuses, either personally to examine into his qualifications to be admitted to the bar of said circuit court, or to appoint two members of the bar of said court to make such examination, whereby he, the said Clyatt, is deprived of his right



to be put to his examination touching his qualifications to practice law in the courts of this state, and, if found qualified, to be licensed to so practice law. Upon this petition an alternative writ of mandamus issued from this court to the respondent as circuit judge returnable on the 20th of July, 1897.

<sup>480</sup> The respondent now moves to quash the alternative writ upon the grounds: 1. Because the alternative writ shows that the application made by relator to respondent to be granted license to practice law was made under common-law rules one (1) and two (2) of the rules of practice prescribed by the supreme court of Florida and under and in pursuance of the law as contained in the Revised Statutes of Florida, section 979. 2. Because the power and authority to license attorneys at law is now exclusively conferred upon a state board of legal examiners by the provisions of chapter 4539, laws approved June 5, 1897, entitled "An act to regulate admissions to the bar of this state, to create a board of legal examiners, and to provide for a uniform system of legal examinations."

The recent act of the legislature thus urged as the respondent's reason for refusing to entertain the relator's application for examination and admission to practice law, and as the ground of his motion to quash the alternative writ, is as follows:

#### CHAPTER 4539—[No. 25].

An act to regulate admissions to the bar of this state, to create a board of legal examiners, and to provide for a uniform system of legal examinations.

Be it enacted by the legislature of the state of Florida:

Section 1. That the state board of legal examiners is hereby created, to consist of five (5) members, who shall be appointed by the supreme court of Florida, one of whom shall hold his office for one year, one for two years, one for three years, one for four years, and one for five years, and each until his successor shall be appointed and qualified, and each year <sup>481</sup> thereafter another examiner shall be appointed for the term of five years in the stead of the examiner whose term shall have expired. Said board shall have the power to make by-laws and rules necessary for the fulfillment of their duties.

Sec. 2. It shall be the duty of said board of legal examiners to examine all applicants for admission to the bar of this state, in respect to their intellectual, moral and professional qualifications, in accordance with such uniform and general regulations as they may adopt and publish. When said board, after such

examination, shall be satisfied of the qualifications and fitness of an applicant, and upon his taking the oath required by law, they shall grant him a certificate to that effect, which certificate, when registered as hereinafter provided, shall entitle him to practice law in all of the courts of this state.

Sec. 3. That said board shall hold at least one examination a year in each of the circuits of this state, from which applications shall be received. Two members, with the authority of said board, may conduct any such examination, in accordance with the rules of the board; provided, that the subjects for such examination shall first be prescribed by the said board.

Sec. 4. Said board of legal examiners shall be entitled to collect from each person examined, a fee not to exceed the sum of five dollars, which fee shall be used to defray the expenses of said board. The expenses of said board shall not be paid or chargeable to this state.

Sec. 5. All certificates so issued by said board shall be filed with, and registered by the clerk of the supreme court, for which service he shall be entitled to <sup>482</sup> the same fee as is now provided by law for certificates of admission to the supreme court.

Sec. 6. All laws or parts of laws in conflict herewith, or any part hereof, are hereby repealed, and this act shall take effect from its approval by the governor.

The relator meets this motion to quash the alternative writ with the contention that the said act of the recent legislature is unconstitutional and void: 1. Because it violates the following section 27 of article 3 of the state constitution: "The legislature shall provide for the election by the people or appointment by the governor of all state and county officers not otherwise provided for by this constitution, and fix by law their duties and compensation." 2. Because it further violates the following section 7 of article 16 of the constitution: "The legislature shall not create any office the term of which shall be longer than four years." 3. Because the act of admitting an attorney to the practice of law at the bar of the courts is a judicial act, and the exercise of a judicial function, and that it is such a judicial power as cannot be delegated by the legislature to a board of legal examiners of its own creation. That in so doing the statute violates article 2 of the constitution that prohibits the exercise by any person belonging to any one of the three great departments of the state government of any power appertaining to either of the others.

If this act of the late legislature does not violate any of the mandates, limitations, or restrictions upon legislation as contained in the constitution, then the respondent was right in refusing to entertain the application of the relator; but if it violates the organic <sup>483</sup> law, it is void, and furnishes no reason for such refusal.

The first and second grounds urged against its constitutionality makes it necessary to respond to the questions: 1. What is an office, within the contemplation of the quoted provision of the constitution requiring the legislature to provide for the election by the people, or appointment by the governor, of all state and county officers not otherwise provided for by the constitution? And are the members of the "state board of legal examiners" provided for by this act such officers as are required by the constitution to be elected by the people or appointed by the governor? 2. Is the said state board of legal examiners such an office as that the term thereof is prohibited by the constitution from continuing longer than four years? Chief Justice Marshall, in the leading case of *United States v. Maurice*, 2 Brock., 96, defines an office and an officer as follows: "An office is defined to be 'a public charge or employment,' and he who performs the duties of the office, is an officer. Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer."

<sup>484</sup> In the advisory opinion of the judges of the supreme court to the governor, 3 Maine, 481, it is said that "there is a manifest difference between an office, and an employment under the government. We apprehend that the term 'office' implies a delegation of a portion of the sovereign power to, and possession of, it by the person filling the office; and the exercise of such power within legal limits, constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still it is a legal



power, which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state."

In *State v. Kennon*, 7 Ohio St. 546, it is held that the official or unofficial character is to be determined not by the presence or absence of an official designation, but by the nature of the functions to be performed. That if the duty, charge, and trust to be performed is conferred by public authority, for public purposes of important character, and are not transient, occasional, or incidental, but durable, permanent, and continuous, then it is a public office, and the person having power to perform it is a public officer. In the same case it is held that though emolument is a usual, yet it is not a necessary, element to constitute an office: *State v. Anderson*, 45 Ohio St. 196.

In *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169, it is said that "an office is a continuing charge or employment, the duties of which are defined by rules prescribed by law, and not by contract, and the person who fills it is an officer."

<sup>485</sup> In *United States v. Hartwell*, 6 Wall. 385, it is said that "an office is a public station or employment, conferred by the appointment of government; and embraces the ideas of tenure, duration, emolument, and duties."

These and substantially similar definitions of the terms "office" and "officer" will be found to have been adopted and acted upon in the following cases: *Bunn v. People*, 45 Ill. 397; *Ex parte Yale*, 24 Cal. 241; 85 Am. Dec. 62; *Lindsey v. Attorney General*, 33 Miss. 508; *Hill v. Boyland*, 40 Miss. 618; *Eliason v. Coleman*, 86 N. C. 235. In this last-cited case it is said that "the true test of a public office is that it is parcel of the administration of government, civil or military, or is itself created directly by the law-making power; and an information in the nature of a quo warranto only will lie to recover same": *State v. Stanley*, 66 N. C. 59; 8 Am. Rep. 488; *People v. Hayes*, 7 How. Pr. 248; *In re Corliss*, 11 R. I. 638; 23 Am. Rep. 538; *People v. Langdon*, 40 Mich. 673; *State v. Wilson*, 29 Ohio St. 347; *Bradford v. Justice's Inferior Court*, 33 Ga. 332; *Case of Daniel Wood*, note (b) to *Seymour v. Ellison*, 2 Cow. 29; *People v. Bedell*, 2 Hill, 196; *Lewis v. Jersey City*, 51 N. J. L. 240; *Matter of Hathaway*, 71 N. Y. 238; *People v. Nostrand*, 46 N. Y. 375; *Matter of Oaths by Attorneys*, 20 Johns. 493; *Porter v. Pillsbury*, 11 How. Pr. 240; 7 Bacon's Abridgment, tit., "Offices and Officers," 279, 280. In 19 American and English Encyclopedia of Law, page 382 et seq., the various definitions and essential ele-

ments of the term "office," as given in the cases cited, and others, is very aptly and correctly summarized as follows: "The <sup>486</sup> term 'office' implies a delegation of a portion of the sovereign power to, and possession of, it by the person filling the office, a public office being an agency for the state, and the person whose duty it is to perform the agency being a public officer. The term embraces the idea of tenure, duration, emolument and duties, and has respect to a permanent public trust to be exercised in behalf of government, and not to a merely transient, occasional or incidental employment. A person in the service of the government who derives his position from a duly and legally authorized election or appointment, whose duties are continuous in their nature and defined by rules prescribed by government, and not by contract, consisting of the exercise of important public powers, trusts, or duties, as a part of the regular administration of the government, the place and the duties remaining, though the incumbent dies or is charged, every office in the constitutional meaning of the term implying an authority to exercise some portion of the sovereign power, either in making, executing or administering the laws": Mechem on Public Officers, secs. 1-9 inclusive, and citations.

Applying these tests to the statute under consideration, we are clearly satisfied, and without any semblance of doubt, that the board of legal examiners created thereby, as the medium through whom the privilege of practicing law is to be conferred upon the citizen, are such officers as our constitution requires the legislature to provide for the creation of in one or the other of the two prescribed modes, viz: Either by election by the people, or by appointment by the governor. Legislative regulation of skilled trades and learned professions, in order to prevent the widespread damage that would result from their unskilled exercise, <sup>487</sup> is generally conceded to be a legitimate exercise of the police power of the state: Tiedeman's Limitation of Police Power, sec. 87, and cases cited. The act in question makes the board of legal examiners created by it the sole and exclusive instrument by and through which this highly important and delicate governmental power is to be exercised, and thereby confers upon them the exercise of governmental functions. The duties it prescribes for them are lasting and continuous, and not merely casual, temporary or incidental, but the place and the duties remain even if the persons appointed to perform them shall die or resign. It prescribes a regular tenure of office with fixed periods when successors are to be appointed; and emoluments are prescribed, par-

simonious though they be in amount. The office and the officers are created by governmental authority, for the discharge of legally prescribed public duties, as part of the sovereign power of the state and for the public good. They are not only clothed with power to apply the test of fitness of all applicants, and to judge of such fitness, but are further empowered, by rules, of their own adoption, to prescribe the scope and character of such test. They are state officers because the field for the exercise of their jurisdiction, duties and powers is coextensive with the limits of the state, and extends to every part of it: Advisory Opinion to Governor, 13 Fla. 687.

Having no doubt that the members of this board of legal examiners are such state officers as, under the constitution, can be created only by election by the people, or appointment by the governor, and whose terms of office are by the constitution limited not to exceed four years, we are forced to declare the whole act unconstitutional and void, because it provides, contrary <sup>488</sup> to the constitution, that such board shall be appointed by the supreme court, and because it fixes their terms of office for five years, instead of within the constitutional limit of four years.

Under the first ground of the respondent's motion to quash the alternative writ the point is made in the argument here that the relator's application for admission was made in compliance with rules one (1) and two (2) of the rules of practice prescribed for the government of the circuit courts, instead of under and in pursuance of section 979 of the Revised Statutes. That under the provisions of subdivision one (1) of said section 979 of the Revised Statutes the applicant for admission is required "to satisfy the judge by satisfactory evidence that he is twenty-one years of age, and of good moral character," whereas circuit court rule number 1, under which the application was made, requires the applicant to present "satisfactory evidence that he is twenty-one years of age and of good moral character." There is no difference whatever between the requirements of the statute and of the rule. The statute provides that the applicant must satisfy the judge by satisfactory evidence that he is twenty-one years of age and of good moral character, whereas the rule says he must present satisfactory evidence of these facts to the judge. If the evidence presented to the judge is satisfactory, as the rule requires it to be, then of course the judge must be satisfied and vice versa, if the judge is not satisfied, then it follows that the evidence offered is not satisfactory. The only difference that



we can discover between the rule of court and the statute is, that the statute is open to the criticism of being tautologous <sup>489</sup> in its frequent use of the qualifying word "satisfy."

Having found the act to be unconstitutional and void upon the two grounds mentioned, it becomes unnecessary to consider the third ground of assault thereon. The result is that the respondent's motion to quash the alternative writ is denied, and the peremptory writ is awarded.

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**OFFICERS—APPOINTMENT OF—POWER OF LEGISLATURE.** The power to appoint or elect to office does not necessarily belong to either the legislative, executive, or judicial departments. It is commonly exercised by the people, but the legislature may, as the law-making power, when not restricted by the constitution, provide for its exercise by either department of the government, or by any person or association of persons which it may choose to designate for that purpose: *Fox v. McDonald*, 101 Ala. 51; 46 Am. St. Rep. 98. The effect of statutes similar to that considered in the principal case is discussed in the monographic note to *People v. Freeman*, 13 Am. St. Rep. 125-147. Such a statute is unconstitutional if the power of appointment has been conferred by the constitution upon any other branch of the government than the legislative: *Mayor v. State*, 15 Md. 376; 74 Am. Dec. 572.

#### **Public Offices, What Are.**

*Definitions.*—The term "office" has been variously defined, involving at different times different elements. The word "office" is of very vague and indefinite import; everything concerning the administration of justice or general interests of society may be supposed to be within the meaning of the term, especially if fees and emoluments are annexed to the office: *Commonwealth v. Sutherland*, 3 Serg. & R. 145; *United States v. Hatch*, 1 Pinn. 182. The terms "office" and "public trust" have no legal or technical meaning distinct from their ordinary signification: *Wood's case*, 1 Hopk. Ch. 7; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *Hill v. Boyland*, 40 Miss. 618; *People v. Brooklyn*, 77 N. Y. 503; 33 Am. Rep. 659. The term "office" in its common acceptance is sufficiently comprehensive to include all persons in any public station or employment conferred by government: *Vaugh v. English*, 8 Cal. 40; and see, to the same effect, *Rowland v. Mayor*, 83 N. Y. 376. "Lexicographers generally define 'office' to mean public employment, and I apprehend its legal meaning to be an employment on behalf of the government in any station or public trust, not merely transient, occasional, or incidental. In common parlance, the term 'office' has a more general significance. Thus we say the office of an executor or guardian or the office of a friend": *Matter of Oath*, 20 Johns. 493. Though the term "office" has no legal or technical meaning attached to it distinct from its ordinary acceptance, it is customary among the authorities to speak of it in the restricted sense of a "public office."

The terms "office" and "office and public trust" have reference only to those duties which are of a public nature: *Ex parte Yale*, 24

Cal. 242; 85 Am. Dec. 62. Etymologically, "office" principally implies a duty and in the next place, a discharge of that duty: Bacon's Abridgement, 7, 279. In the abstract "office" signifies a place of trust. It is an entity which may exist in fact without an incumbent: *People v. Stratton*, 28 Cal. 382. The most quoted definitions are the ones given immediately below. "Offices are public or private, and it is said that every man is a public officer who hath any duty concerning the public, and that he is a public officer who hath to do with another man's affairs against his will and without his leave": Carth. 478. "An office is a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging": 2 Blackstone's Commentaries, 36. And to the same effect are 3 Kent's Commentaries, 454, and 7 Bacon's Abridgment, 279. In *Gosman v. State*, 106 Ind. 203, the word "right" is said to embrace the idea that the office has been created by adequate authority, and that tenure, duration, emoluments, and duties have been prescribed. "An office is defined to be a public charge or employment, and he who performs the duties of the office is an officer": *United States v. Maurice*, 2 Brock. 102. These definitions do not distinguish a 'public office' from a public employment." The mere fact that a duty or employment is public will not constitute it an office. The definition given in *Olmstead v. Mayor*, 42 N. Y. Sup. Ct. 481, while embracing the above definitions, goes further and gives some criteria for distinguishing an office from a mere employment; it is thus: "Office is a right to exercise a public function or employment and take the fees and emoluments belonging to it. It involves the idea of tenure, duration, fees, or emoluments, and powers, as well as that of duty. It implies an authority to exercise some portion of the sovereign power of the state either in making, administering, or executing the laws." And see Chief Justice Marshall's opinion in *United States v. Maurice*, 2 Brock. 102, set forth below.

In *United States v. Hartwell*, 6 Wall. 385, an office is said to be a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. Civil officers embrace such officers as in whom part of the sovereignty or municipal regulations or general interests of society are vested: *United States v. Hatch*, 1 Pinn. 182. An office is sometimes spoken of as an agency of the state for transacting the public business: *State v. Judges*, 21 Ohio St. 1; *People v. Bledsoe*, 68 N. C. 457; *Beebe v. Robinson*, 52 Ala. 67. The word "office" refers to the functions performed, and not to the place where the service is rendered: *Stone v. United States*, 3 Ct. of Cl. 260. And in the same case it is said that the word "employé" is more extensive than "clerk" or "officer," signifying anyone in place, or having charge or using a function as well as one in office. In *Rowland v. Mayor*, 83 N. Y. 372, it is said: "We are not to be too precise in seeking for words and definitions. We may also look at the intent of the statute, and so ascertain the meaning of the words used and who are aimed at."

The meaning of the words "office" and "officer" necessarily varies with its use in different statutes, and to determine it correctly in a particular instance, regard must be had to the intention of the act and the subject matter in respect to which the terms are used: *Ryan v. Mayor*, 50 How. Pr. 91.

Thus it is difficult to frame a definition to cover all cases, and each case must be considered largely of itself, and referred rather to the general nature of an office than to a particular definition.

*Nature of a Public Office.*—In England, offices are considered incorporeal hereditaments, grantable by the crown, and a subject of vested or private interests. This is not so in the American states; they are not held by grant or contract, nor has any person a private property or vested interest in them; they are the creations of the people in the exercise of their sovereignty to carry their sovereignty into effect, and they are therefore liable to such modifications and changes as the power creating them may determine: *State v. Davis*, 44 Mo. 129; *State v. Dews*, R. M. Charlt. 397. An office is a creation of the law, by the sovereign power of the state, for public purposes, to give effect to its sovereignty and to carry into effect its will. Public offices are created for the purpose of effecting the ends for which government has been instituted, which are the common good, and not for the profit, honor, or private interest of any one man, family, or class of men: *State v. Dews*, R. M. Charlt. 397; *Brown v. Russel*, 166 Mass. 14; 55 Am. St. Rep. 357.

*An Office Then is an Exercise of a Portion of the Sovereign Power of the State or Government.*—The primary, necessary, and fundamental test of an office is that it should involve the exercise of some portion of the sovereign power of the state: *State v. Dews*, R. M. Charlt. 397; *Opinion of the Judges*, 3 Me. 481; *In re Dorsey*, 7 Port. 293; *Attorney General v. Jochim*, 99 Mich. 358; 41 Am. St. Rep. 606; *State v. Vallé*, 41 Mo. 29; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *Hill v. Boyland*, 40 Miss. 618; *Olmstead v. Mayor*, 42 N. Y. Sup. Ct. 481; *Eliason v. Coleman*, 86 N. C. 235; *High on Extraordinary Legal Remedies*, par. 620; *United States v. Hatch*, 1 Pinn. 182; *People v. Nostrand*, 46 N. Y. 381; *United States v. Lockwood*, 1 Pinn. 359; *Attorney General v. Drohan*, 169 Mass. 534; 61 Am. St. Rep. 301. The power and jurisdiction of an officer constitute the office, and are of the essence of it, and inseparable from it: *Commonwealth v. Gamble*, 62 Pa. St. 343; 1 Am. Rep. 422. An office is a public position to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public: *United States v. Lockwood*, 1 Pinn. 359; *High on Extraordinary Legal Remedies*, par. 620, quoted and approved in *Eliason v. Coleman*, 86 N. C. 235.

In the *Opinion of the Judges*, 3 Me. 481, the nature of an office is set forth as follows: "There is a manifest difference between an office and an employment under the government. We apprehend that the term 'office' implies a delegation of a portion of the sov-



ereign power to, and the possession of it by, the person filling the office; and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments, and sometimes to another, still it is a legal power which may be rightfully exercised. And in its effects it will bind the rights of others and be subject to revision and correction only according to the standing laws of the state. An employment merely has none of these distinguishing features. A public agent acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the acts performed the authority and power of a public act or law. And if the act be such as not to require such subsequent sanction, still it is only a species of service performed under the public authority, and for the public good, but not in the execution of any standing laws, which are considered as rules of action and guardian of rights. An office being a grant and possession of a portion of the sovereign power, every person should take the required oath. 'Office' implies an authority to exercise some portion of the sovereign power, either in making, executing, or administering the laws."

When an office has been created by the constitution itself, or by statute enacted pursuant to its provisions, the incumbent, as a component member of one of the bodies of the magistracy, is vested with a portion of the powers of the government. A civil office imports an office in which is reposed some portion of the sovereign power of the state, and of necessity connected with one of the three great branches of government: *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169.

*The Source of Office Should be from the Sovereign Power*, by creation either in the constitution of the state, or by legislative enactment in accordance with provisions of the constitution: *Ellison v. Coleman*, 86 N. C. 235. The government is the fountain of office: *State v. Vallé*, 41 Mo. 29. Public offices are provided for by general laws for public political purposes: *State v. Dews*, R. M. Charlt. 397. The state in this country, as the crown in England, is the fountain of honor and of office. It is the state prerogative to create office. The right to office must be granted by law: *White v. Clements*, 39 Ga. 274. Within the legislative power rests the creation and abolition of public offices, the enlargement or diminution of their duties and compensations, subject to the constitution: *Ex parte Lambert*, 52 Ala. 79. That an office must be provided for by constitution or statute is held in *People v. Murray*, 70 N. Y. 521; *People v. Pinckney*, 32 N. Y. 377. That office implies creation by law or by adequate authority is held in *State v. Kennon*, 7 Ohio St. 547; *Gosman v. State*, 106 Ind. 203; *Hall v. Wisconsin*, 103 U. S. 5; *In re Dorsey*, 7 Port. 293. "Offices are created, the officers appointed, their powers given, their duties defined, and the salaries fixed directly by act of legislature. Officers exercise a share of the powers of the civil government, and their authority comes directly from the state. They are none the less civil officers because their functions are con-

fined to the local administration": State v. Vallé, 41 Mo. 29. Public office can be created by a municipal corporation and abolished without the consent of the officer: Augusta v. Sweeney, 44 Ga. 463; 9 Am. Rep. 172. A mere legislative office is always subject to be controlled, modified, or repealed by the body creating it: State v. Davis, 44 Mo. 129. All offices are created for the public good, and are subject to the power creating them: Farwell v. Rockland, 62 Me. 296; Smith v. New York, 37 N. Y. 518. All officers, except when legislative authority is limited or restricted by constitutional provisions, are subject to the will of the legislature: Prince v. Skillin, 71 Me. 361; 36 Am. Rep. 325. The legislature may remove officers not only by abolishing the office but by declaring it vacant: Attorney General v. Jochim, 99 Mich. 358; 41 Am. St. Rep. 606. In Attorney General v. Barstow, 4 Wis. 567, where the case involved the right to the position of governor, it was held that the governor was a civil officer and a department of the government, but that the legislature constituted a department, and not an office. The nature of government and of the three departments were considered at length. All powers of government are derived from the people. The state is the organism through which, and in the name of which, all functions are to be performed. The terms "office" and "department" involve the same idea, namely: that of an agency by which the functions of the state can be performed. No one office or department can claim to be sovereign, separate, or independent. Whatever power one "office" or "department" can rightfully exercise must be, and is, derived from the constitution which the people in the exercise of their sovereignty have adopted.

*An Office Is Not Created by Grant nor by Contract.*—An office is not created by a grant of a portion of the sovereign power so as to confer upon the officer a vested right in the office or a property in it; nor is it created by contract between the government and the officeholder; it is a delegation of a portion of the sovereign power of the state: Ex parte Lambert, 52 Ala. 79; State v. Dews, R. M. Charl. 397; Augusta v. Sweeney, 44 Ga. 463; 9 Am. Rep. 172; Primm v. Carondelet, 23 Mo. 22; Prince v. Skillin, 71 Me. 361; 36 Am. Rep. 325; State v. Davis, 44 Mo. 129; Attorney General v. Jochim, 99 Mich. 358; 41 Am. St. Rep. 606; State v. Hawkins, 44 Ohio St. 109; Smith v. New York, 37 N. Y. 518; Conner v. New York, 5 N. Y. 285; State v. Douglas, 26 Wis. 428; 7 Am. Rep. 87; United States v. Maurice, 2 Brock. 103; United States v. Hartwell, 6 Wall. 385. Public offices are not incorporeal hereditaments. Nor have they the character or qualities of grants: Conner v. New York, 5 N. Y. 285; State v. Davis, 44 Mo. 129. The incumbent of an office has not any property in it. His right to exercise it is not based upon any contract or grant. It is conferred upon him as a public trust to be exercised for the benefit of the public. A public office and its creation are matters of public law: State v. Hawkins, 44 Ohio St. 109. Public offices are delegations of portions of the sovereign power for the welfare of the people. They are not the subject of contract, but are the agencies of the state, revocable at pleasure



by the authority creating them, unless such authority is limited by the power which conferred it: *Attorney General v. Jochim*, 99 Mich. 358; 41 Am. St. Rep. 606. An office is simply an appointment or authority on behalf of the government to perform certain duties usually at and for a certain compensation. The office and compensation are entirely within the control of the government. There is neither property nor contract in it. It is but a deputation for the benefit and advantage of the government: *Smith v. New York*, 37 N. Y. 518. In the Opinion of the Judges, 3 Me. 481, quoted above, the term "office" implies a possession by the officeholder of the portion of the sovereign power delegated. An agreement, authorized by law, between the government and third parties, expressly stipulating and describing the duties and fixing the compensation, does not create an office: *Hall v. Wisconsin* 103 U. S. 5; *United States v. Maurice*, 2 Brock. 103. A contractor, who performs services for the government for compensation with a view to his own profit, and whose subordinates employed and paid by him are liable to be dismissed at his pleasure, is not an officer of the government: *Sawyer v. Corse*, 17 Gratt. 230; 94 Am. Dec. 445. An office is frequently spoken of as a right and duty to exercise a public employment and take the fees or emoluments: 2 Blackstone's Commentaries, 36; 3 Kent's Commentaries, 454; *Commonwealth v. Gamble*, 62 Pa. St. 343; 1 Am. Rep. 422; *Bunn v. People*, 45 Ill. 397; *State v. Wilson*, 29 Ohio St. 347; *Bowers v. Bowers*, 26 Pa. St. 74; 67 Am. Dec. 398; *Attorney General v. Barstow*, 4 Wis. 567; *Butler v. Regents*, 32 Wis. 124; *Leach v. Cassidy*, 23 Ind. 449; *Waldo v. Wallace*, 12 Ind. 569; *Gosman v. State*, 106 Ind. 203; *Miller v. Sacramento*, 25 Cal. 94; *People v. Stratton*, 28 Cal. 382. This right is not such as to give him a vested right or property in the office. It is only such a possession as will enable him to discharge the functions of his office. In North Carolina the decisions following the rule of the common law hold that an office is property, and that the incumbent has the same right to it that he has to any other property, subject to legislative control in as far as it concerns the interests of the community: *Hoke v. Henderson*, 4 Dev. 1; 25 Am. Dec. 677; *King v. Hunter*, 65 N. C. 603; 6 Am. Rep. 754; *Vann v. Pipkin*, 77 N. C. 408; *Brown v. Turner*, 70 N. C. 93. Other decisions hold that an officer has no right to the prospective fees of his office, and that an office is not a subject of sale, or encumbrance: *Smith v. New York*, 37 N. Y. 518; *Conner v. Mayor*, 5 N. Y. 285; *State v. Davis*, 44 Mo. 129; *Prince v. Skillin*, 71 Me. 361; 36 Am. Rep. 325; *State v. Hawkins*, 44 Ohio St. 109; *State v. Douglas*, 26 Wis. 428; 7 Am. Rep. 87.

*An Office Is Part of the Administration of Government.*—An office being in its nature a portion of the sovereign power of the state, deriving its authority from that power, and being created by it, is a part of the due administration of the government. The true test of a public office seems to be that it is a parcel of the administration of government, civil or military, or is itself created directly by the lawmaking power: *Eliason v. Coleman*, 86 N. C. 235. An



officer of the county is one by whom the county performs its usual political functions, the functions of government: *Sheboygan Co. v. Parker*, 3 Wall. 93. It is of the nature of an office in that it is a part of the regular administration of the government: Cases cited above, and *Opinion of the Judges*, 3 Me. 481; *State v. Kennon*, 7 Ohio St. 546; *Walker v. Cincinnati*, 21 Ohio St. 14; 8 Am. Rep. 24; *State v. Wilson*, 29 Ohio St. 347; *Conwell v. Voorhees*, 13 Ohio St. 523; 42 Am. Dec. 206; *People v. Nostrand*, 46 N. Y. 381; *Bunn v. People*, 45 Ill. 397; *People v. Langdon*, 40 Mich. 673; *People v. McKinney*, 10 Mich. 54; *Eliason v. Coleman*, 86 N. C. 235. It is the substance of the powers exercised, the duty of the office, and the nature of that duty, which make the office, and not the extent of authority. If the office involves the exercise of some portion of the sovereign power, it makes no difference whether it be great or small, or whether the functions be general or circumscribed: *Vaughn v. English*, 8 Cal. 40; *People v. Jobs*, 7 Colo. 589; *Attorney General v. Drohan*, 169 Mass. 534; 61 Am. St. Rep. 301; *State v. Vallé*, 41 Mo. 29; *State v. Walton*, 62 Me. 106; *People v. Bedell*, 2 Hill, 199; *State v. Kennon*, 7 Ohio St. 547; *Goshen v. Stonington*, 4 Conn. 209; 10 Am. Dec. 121; *State v. Body*, 53 N. H. 610; *Commonwealth v. Evans*, 74 Pa. St. 124; *Lewis v. Jersey City*, 51 N. J. L. 240; *People v. Nostrand*, 46 N. Y. 381; *United States v. Maurice*, 2 Brock. 104; *United States v. Bloomgart*, 2 Ben. 356. In *Meagher v. Storey*, 5 Nev. 244, public acts performed without legal authority were held valid, thus constituting an office "de facto." But in *Jester v. Spurgeon*, 27 Mo. App. 477, it is said that there can be no office "de facto," that is, that acts done by one purporting to act in an official capacity, the office having no legal existence, are not valid as to the public nor as to third persons. A clergyman, in the celebration of marriage, is a public civil officer: *Goshen v. Stonington*, 4 Conn. 209; 10 Am. Dec. 121. The duty of appointing to an office constitutes of itself a public office: *State v. Stanley*, 66 N. C. 59; 8 Am. Rep. 488; *State v. Tate*, 68 N. C. 547. Persons authorized by law to receive or disburse money are public officers: *Commonwealth v. Evans*, 74 Pa. St. 124; *Commonwealth v. Morrissey*, 86 Pa. St. 416; *Brown v. Turner*, 70 N. C. 93; *Lorillard v. Monroe*, 11 N. Y. 392; 62 Am. Dec. 120; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *Morse v. Lowell*, 7 Met. 152; *People v. McKinney*, 10 Mich. 54; *State v. Brandt*, 41 Iowa, 593; *United States v. Bloomgart*, 2 Ben. 356; *State v. Body*, 53 N. H. 610. Persons intrusted with judicial powers are also public officers: *People v. Ransom*, 58 Cal. 558; *Bishop v. Oakland*, 58 Cal. 572; *Commonwealth v. Gamble*, 62 Pa. St. 343; 1 Am. Rep. 422. In North Carolina legislators are not officers. They hold "places" of trust and profit: *Worthy v. Barret*, 63 N. C. 199; *Doyle v. Raleigh*, 89 N. C. 133; 45 Am. Rep. 677. Members of the assembly or legislature are officers: *In re Newport Charter*, 14 R. I. 655; *Hill v. Boyland*, 40 Miss. 619; *Morril v. Haines*, 2 N. H. 246; *State v. Boody*, 53 N. H. 610; *People v. Brooklyn*, 77 N. Y. 503; 33 Am. Rep. 659. The executive heads of government and other persons

exercising executive functions, whether national, state, county, or municipal are considered officers: *Dayton v. Lynes*, 30 Conn. 351; *McCoy v. Curtice*, 9 Wend. 17; 24 Am. Dec. 114; *United States v. Tinklepaugh*, 3 Blatchf. 428; *United States v. Martin*, 17 Fed. Rep. 150. The office of "elder minister" in the Union Church of Africans, having no temporal rights attached to it, is not such an office that the one entitled can be restored to it by mandamus: *Union Church v. Sanders*, 1 Houst. 100; 63 Am. Dec. 187.

*Duties Prescribed by Law.*—It is of the nature of an office that its duties be public, and defined by rules prescribed by the government. Chief Justice Marshall in *United States v. Maurice*, 2 Brock. 103, thus sets forth the nature of an office: "It is a public charge or employment, and he who performs the duties of an office is an officer. Although an office is an employment, not every employment is an office. A man may certainly be employed under a contract express or implied to do an act or perform a service without becoming an officer. But if the duty be a continuing one which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties pertaining to his station without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge, or employment from an office, or the person who performs the duties from an officer." While it is not true that every service or duty prescribed by statute constitutes an office, still such statutory provisions concerning a public employment, especially if the duties be of a general nature, are generally sufficient to determine the employment an office. The principal cases are: *United States v. Maurice*, 2 Brock. 103; *United States v. Tinklepaugh*, 3 Blatchf. 430; *United States v. Hartwell*, 6 Wall. 385; *Ogden v. Raymond*, 22 Conn. 379; 58 Am. Dec. 429; *Bradford v. Justices*, 33 Ga. 332; *Bunn v. People*, 45 Ill. 397; *Ellis v. State*, 4 Ind. 1; *Prather v. Lexington*, 13 B. Mon. 559; 56 Am. Dec. 585; *McCoy v. Curtice*, 9 Wend. 17; 24 Am. Dec. 113; *Moser v. Mayor*, 21 Hun, 163; *People v. Comptroller*, 20 Wend. 595; *Hill v. Boyland*, 40 Miss. 618; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *State v. Castell*, 22 La. Ann. 15; *Opinion of the Judges*, 3 Me. 481; *State v. Vallé*, 41 Mo. 29; *Smith v. Mayor*, 67 Barb. 223; *Ogden v. Raymond*, 22 Conn. 379; 58 Am. Dec. 429; *Olmstead v. Mayor*, 42 N. Y. Sup. Ct. 481; *People v. Nostrand*, 46 N. Y. 381; *Lorillard v. Monroe*, 11 N. Y. 392; 62 Am. Dec. 120; *Commonwealth v. Gamble*, 62 Pa. St. 343; 1 Am. Rep. 422; *State v. Wilson*, 29 Ohio St. 347; *State v. Anderson*, 45 Ohio St. 196; *State v. Kennon*, 7 Ohio St. 547; *Hall v. Wisconsin*, 103 U. S. 9; *Platt v. Beach*, 2 Ben. 303; *Jones v. Hobbs*, 4 Bax. 119; *State v. Claypool*, 13 Ohio St. 14; *Walker v. Dunham*, 17 Ind. 483. These are additional cases in which "office" is defined to be a public duty, trust, or employment: *Ex parte Lambert*, 52 Ala. 79; *Farrel v. Bridgeport*, 45 Conn. 191; *Spence v. Harvey*, 22 Cal. 336; 83 Am. Dec. 69; *Ex parte Law*, 35 Ga. 285; *Dean v. Healy*, 66 Ga. 503; *United States v. Bloomgate*, 2 Ben. 356; *People v. Murray*, 5 Hun, 42; *In re Oaths*, 20 Johns.

493; *State v. Stanley*, 66 N. C. 59; 8 Am. Rep. 488; *Doyle v. Raleigh*, 89 N. C. 133; 45 Am. Rep. 677; *Sheboygan Co. v. Parker*, 3 Wall 93; *Hamlin v. Kassafer*, 15 Or. 456; 3 Am. St. Rep. 176. Although an office is an employment, it does not follow that every employment is an office: *United States v. Maurice*, 2 Brock. 96. Still in some cases it is held that any public charge, employment, or trust constitutes an office: *In re Wood*, Hopk. Ch. 6; *People v. Hayes*, 7 How. Pr. 248; *People v. Brooklyn*, 77 N. Y. 503; 33 Am. Dec. 659; *Rowland v. Mayor*, 83 N. Y. 372; *Smith v. Moore*, 90 Ind. 294; *Commonwealth v. Sutherland*, 3 Serg. & R. 145; *United States v. Hatch*, 1 Pinn. 182.

*That the Duties of an Office Should Be Continuous.*—It is of the nature of an office that its duties be continuous, or that it involve the ideas of tenure, duration, or continuance. That this is an essential element is not held in all the cases. The weight of decision is that an employment, to be an office, should involve the ideas of tenure, duration, or continuance. This point arises in the determination of whether or not commissioners appointed for the performance of particular duties are officers.

In *United States v. Hartwell*, 6 Wall. 385, the term "office" was held to embrace the idea of tenure, duration, emolument, and duties. "A government office differs from a government contract. The latter is limited in its duration and specific in its objects. The former is continuing and permanent." Office is a public duty continuous in its nature: *Auffmordt v. Hedden*, 30 Fed. Rep. 360. "Public office" as used in the constitution has respect to a permanent public trust or employment to be exercised generally and in all proper cases. It does not include a special, transient, occasional, or incidental duty": *In re Hathway*, 71 N. Y. 238. Further authority is found in *Olmstead v. Mayor*, 42 N. Y. Sup. Ct. 481; *Bunn v. People*, 45 Ill. 397; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *People v. Brooklyn*, 77 N. Y. 503; 33 Am. Rep. 659; *People v. Norstrand*, 46 N. Y. 375; *State v. Anderson*, 45 Ohio St. 196; *In re Oaths*, 20 Johns. 492; *People v. Nichols*, 52 N. Y. 478; 11 Am. Rep. 734; *Hill v. Boyland*, 40 Miss. 618; *State v. Board*, 51 N. J. L. 240; *State v. Wilson*, 29 Ohio St. 347; *Ellis v. State*, 4 Ind. 1; *Commonwealth v. Sutherland*, 3 Serg. & R. 149; *United States v. Hatch*, 1 Pinn. 182; *United States v. Maurice*, 2 Brock. 96; *United States v. Germaine*, 99 U. S. 508; *Sheboygan City v. Parker*, 3 Wall. 93; *Brown v. Turner*, 70 N. C. 93. A person employed for a special single employment, in whose employment there is no enduring element, nor designed to be, and the completion of whose duties, although years be required for their performance, ipso facto terminates the employment, is not an officer: *Bunn v. People*, 45 Ill. 397. Commissioners for a particular act or purpose are not officers: *People v. Nichols*, 52 N. Y. 478; 11 Am. Rep. 734; *Sheboygan City v. Parker*, 3 Wall. 93; *United States v. Hatch*, 1 Pinn. 182; *People v. Middleton*, 28 Cal. 603; *State v. Platt*, 4 Harr. (Del.) 154; *Hall v. Wisconsin*, 103 U. S. 5; *Bunn v. People*, 45 Ill. 397; *State v. George*, 22 Or. 142; 29 Am. St. Rep. 586; *David v. Portland Water Comms.*, 14 Or.



98; *McArthur v. Nelson*, 81 Ky. 67; *People v. Ridgely*, 21 Ill. 68; *Owen v. State*, 25 Ind. 107; *Peele v. State*, 118 Ind. 512; *Conrey v. Copland*, 4 La. Ann. 307; *Greaton v. Griffin*, 4 Abb. Pr., N. S., 310. A commissioner for the construction of a public highway is a public officer. It is a public employment for which the incumbent received a compensation. The duties were of a public nature. He exercised a portion of the functions of government, being intrusted with the power of taking private property by right of eminent domain, and authorized to receive and expend a large amount of money in the construction of a public improvement: *People v. Nosstrand*, 46 N. Y. 381. A board of water commissioners, whose office was established by law as a part of the city government, were held to be officers in *State v. Vallé*, 41 Mo. 29. And see *Garnier v. St. Louis*, 37 Mo. 554. Trustees or directors of state benevolent or penal institutions held to be public officers in *People v. McKee*, 68 N. C. 429; *People v. Bledsoe*, 68 N. C. 457; *State v. Wilson*, 29 Ohio St. 347; *People v. Sanderson*, 30 Cal. 160; *Porter v. Pillsbury*, 11 How. Pr. 240. And a receiver of a national bank appointed in accordance with an act of Congress is a United States officer: *Platt v. Beach*, 2 Ben. 303. Regents of the state university are not officers. Their employment is expressly declared to be a private trust: *Lundy v. Delmas*, 104 Cal. 655. In *State v. Stanley*, 66 N. C. 64, 8 Am. Rep. 488, it is held that an office need not have a continuance. It may be one act or a series of acts. And in *State v. Kennon*, 7 Ohio St. 547, it is said that term of duration and emoluments are not deemed necessary to constitute an office. It is the importance of the function. To the same effect are *Commonwealth v. Evans*, 74 Pa. St. 124; *Vaughn v. English*, 8 Cal. 39; *People v. Comptroller*, 20 Wend. 595; *David v. Portland Water Commrs.*, 14 Or. 98; *Brown v. Turner*, 70 N. C. 93. The office remains and the duties continue when a territory becomes a state, and the office is recognized both by the organic law of the territory and the state, though depending on varying provisions of the law: *People v. Jobs*, 7 Colo. 589; *State v. Hitchcock*, 1 Kan. 178; 81 Am. Dec. 503.

*Appointment or Election of Officer.*—It is of the nature of an office that the person exercising its functions or performing its duties should be appointed or elected in accordance with law. An officer of the United States can only be appointed by the President by and with the advice and consent of the senate, or by a court of law, or the head of a department. A person in the service of the government, who does not derive his position from one of these sources, is not an officer of the United States in the sense of the constitution: *United States v. Smith*, 124 U. S. 525; *United States v. Monat*, 124 U. S. 303; *United States v. Germaine*, 99 U. S. 508. The other authorities bearing upon appointment or election are *United States v. Maurice*, 2 Brock. 103; *United States v. Hartwell*, 6 Wall. 385; *United States v. Sears*, 1 Gall. 215; *Armstrong v. United States*, 1 Gilp. 399; *United States v. Bloomgart*, 2 Ben. 356; *Platt v. Beach*, 2 Ben. 303; *Vaughn v. English*, 8 Cal. 39; *Bunn v. People*, 45 Ill. 397; *People v. Hayes*, 7 How. Pr. 249; *McCoy v. Curtice*, 9 Wend.

17; 24 Am. Dec. 113; Ricketts v. Mayor, 67 How. Pr. 320; Collins v. Mayor, 3 Hun, 680; Bradford v. Justices, 33 Ga. 332; State v. Castell, 22 La. Ann. 15; Lewis v. Jersey City, 51 N. J. L. 240; State v. Wilson, 29 Ohio St. 347; Walker v. Cincinnati, 21 Ohio St. 14; 8 Am. Rep. 24; United States v. Perkins, 116 U. S. 483; United States v. Moore, 95 U. S. 760; Governor v. Gordon, 15 Ala. 72; State v. Kennon, 7 Ohio St. 547; Hamlin v. Kassafer, 15 Or. 456; 3 Am. St. Rep. 176; Sanford v. Boyd, 2 Cranch, 78; Kennedy v. Independent School Dist., 48 Iowa, 189; Ogden v. Raymond, 22 Conn. 379; 58 Am. Dec. 429.

In offices created by legislature, where the method of appointment is not presented by the constitution, the legislature, if there is no constitutional limitation, can take upon itself the power of selecting the officers, or can confer the power of appointment upon public boards or officers, or upon the inhabitants of cities, towns, or districts: Brown v. Russel, 166 Mass. 14; 55 Am. St. Rep. 357. Railroad trustees appointed by a judge are not officers: Walker v. Cincinnati, 21 Ohio St. 14; 8 Am. Rep. 24. A school trustee who derives his official character from general law and the election of the people of a particular district, is as much a public agent as if he were the immediate agent of the state, or of one of its political divisions: Ogden v. Raymond, 22 Conn. 379; 58 Am. Dec. 429; People v. Bennet, 54 Barb. 480. The president of a city council is none the less a public officer because he is chosen by a limited elective board composed of public officers: State v. Anderson, 45 Ohio St. 196. An act making a marshal an "ex officio" tax collector does not create a new office: Redwood City v. Grimmerstein, 68 Cal. 512. The designation of a certain position, provided for by statute, in the statute as an "office," or the person filling it as an "officer," is often a sufficient reason for deciding the position an office, and not an employment: Bradford v. Justices, 33 Ga. 332; State v. Wilson, 29 Ohio St. 347; Urket v. Coryell, 5 Watts & S. 60; United States v. Tinklepaugh, 3 Blatchf. 430; People v. Comptroller, 20 Wend. 595; State v. Wharton, 25 La. Ann. 7; Brown v. Turner, 70 N. C. 93; Dickson v. People, 17 Ill. 191; State v. Walton, 62 Me. 106; State v. Branot, 41 Iowa, 593; United States v. Sears, 1 Gall. 215; Ellis v. State, 4 Ind. 1; Porter v. Pillsbury, 11 How. Pr. 240; People v. Tweed, 13 Abb. Pr., N. S., 419; Dailey v. State, 8 Blackf. 329; Kirsey v. Bates, 7 Port. 529; 31 Am. Dec. 722.

*Incidents to Office—Oath.*—The oath is a mere incident to office, and is no essential part of it. It may or may not be required of an officer according to usage or law. Oath, salary, and fees are mere incidents and constitute no part of an office: State v. Stanley, 66 N. C. 59; 8 Am. Rep. 488; Johnson v. Wilson, 2 N. H. 202; 9 Am. Dec. 50; State v. Tate, 68 N. C. 547. When an officer is required by law to take an oath, the oath then becomes a criterion for determining the place an office: Kavanaugh v. State, 41 Ala. 399; Lindsey v. Attorney General, 33 Miss. 508; Sweeny v. Mayor, 5 Daly, 274, affirmed in 58 N. Y. 625; State v. Wilson, 24 Ohio St. 347; State v. Brandt, 41 Iowa, 593; People v. Langdon, 40 Mich.

673; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *People v. Bedell*, 2 Hill, 199. The true test between officers and mere employes is the obligation to take the oath prescribed by law: *Collins v. Mayor*, 3 Hun. 680; *Worthy v. Barret*, 63 N. C. 199. If an officer is eligible, and has taken such oaths, as he is supposed to be required, he may be deemed an officer de jure as well as de facto, until a regular proceeding and judgment declaring his office vacant: *Morgan v. Vance*, 4 Bush, 323.

*Bond*.—Most public officers are required to give bonds and sureties for the faithful performance of their duties. In such cases the bond is an incident to the office, and will aid in distinguishing the office from an employment. A bond is a characteristic of office: *United States v. Maurice*, 2 Brock. 104; *Hall v. Wisconsin*, 103 U. S. 5; *State v. Brandt*, 41 Iowa, 593; *State v. Gardner*, 15 Ala. 234; *Brown v. Russel*, 166 Mass. 14; 55 Am. St. Rep. 357; *People v. Bedell*, 2 Hill, 199; *Jones v. Hobbs*, 4 Bax. 119.

*Commission*.—The commission is only evidence of appointment, and of the right to exercise the powers and perform the duties of an office: *Marbury v. Madison*, 1 Cranch, 137; *State v. Peele*, 124 Ind. 515; *Hill v. State*, 1 Ala. 559; *State v. Allen*, 21 Ind. 516; 83 Am. Dec. 367; *State v. Chapin*, 110 Ind. 272. One who has been appointed or elected in a manner prescribed by law has a designation or title given him by law, and exercises functions concerning the public assigned to him by law, is a public officer, and it can make no difference whether or not he be commissioned by the chief executive officer, with the authentication of the seal of the state: *Bradford v. Judges*, 33 Ga. 332.

*Emoluments*.—Emoluments are not an essential element of an office: *State v. Kennon*, 7 Ohio St. 547; *State v. Stanley*, 66 N. O. 59; 8 Am. Rep. 488. The salary is usually fixed or provided for by the statute creating the office: *Hall v. Wis.*, 103 U. S. 8. In the common-law definitions where "office" is spoken of as a right to exercise a public employment, it also embraced the right to the fees or emoluments: 2 Blackstone's Commentaries, 36; 3 Kent's Commentaries, 454; Bacon's Abridgment, 7, 279. That the salary or fees are prescribed by law, is one means of distinguishing an office from an employment for hire, or by contract: *United States v. Hartwell*, 6 Wall. 385; *Olmstead v. Mayor*, 42 N. Y. Sup. Ct. 481; *People v. Nostrand*, 46 N. Y. 381; *Ricketts v. Mayor*, 67 How. Pr. 320; *Bunn v. People*, 45 Ill. 397; *Shelby v. Alcorn*, 36 Miss. 273; 72 Am. Dec. 169; *Lindsey v. Attorney General*, 33 Miss. 508; *Vaughn v. English*, 8 Cal. 39; *Miller v. Supervisors*, 25 Cal. 98; *Ellis v. State*, 4 Ind. 1; *Foltz v. Kerlin*, 105 Ind. 221; 55 Am. Rep. 197.

*"Office" Distinguished from Employment*.—The distinction between an office and an employment has been referred to in the discussion of the nature and incidents of an office, and especially in the opinions found in "The Opinions of the Judges," 3 Me. 481; *United States v. Maurice*, 2 Brock. 102; *United States v. Hartwell*, 6 Wall. 385. In *People v. Langdon*, 40 Mich. 673, the distinction is made thus: "An office is a special trust or charge created by competent authority. If not



merely honorary, certain duties will be connected with it, the performance of which will be the consideration for its being conferred upon a particular individual, who, for the time being, will be the officer. The officer is distinguished from the employé in the greater importance, dignity, and independence of his position, in being required to take an official oath, and perhaps to give an official bond, in liability to be called to account as a public offender for misfeasance in office, and usually, though not necessarily, in the term of his office." In every definition given of the word "office" the features recognized as characteristics, and distinguishing it from a mere employment, are the manner of appointment and the nature of the duties performed—whether the duties are such as pertain to the particular official designation and are continuing and permanent, and not occasional and temporary: *Lewis v. Jersey City*, 51 N. J. L. 240. A person who receives no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties and exercises no powers depending directly on the authority of the law, but simply performs such duties as are required of him by the persons employing him, and whose responsibility is limited to them is not an officer, and does not hold office, although the persons employing him are public officers, and his employment is in and about a public work or business: *Olmstead v. Mayor*, 42 N. Y. State Ct. 481. The oath is the test between an officer and a placeman in North Carolina: See "Oath" above. The distinction between an office and an employment is in the permanency and continuance of the duties: *Dickson v. People*, 17 Ill. 191.

Persons performing duties and exercising functions in pursuance of statutory directions and authority, of a various, delicate, and important nature, which could be successfully performed only by men of large experience and knowledge of affairs, and which are not merely subordinate and provisional, but in the highest degree authoritative, discretionary, and final in their character, are not to be regarded as mere employés, agents, or committeemen, but are, properly speaking, officers, and the places which they hold are offices: *In re Corliss*, 11 R. I. 638; 23 Am. Rep. 538.

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## THOMSON v. KYLE.

[89 FLORIDA, 582.]

**CONFLICT OF LAW.—MORTGAGE EXECUTED BY A WOMAN AS SECURITY FOR HER HUSBAND'S DEBT**, though void in the state where the indebtedness arose, is subject to the laws of the state in which the property is located, in order to ascertain its validity, construction, and the capacity of the parties to execute it, and if the laws of such state permit a woman to execute a mortgage to secure her husband's debt, the mortgage will be enforceable in the courts thereof.

**USURY—CONFLICT OF LAW.**—A note executed and payable in one state, secured by a mortgage on lands in another, will

be governed by the rate of interest in the former; and if by the laws of such state all interest is forfeited for usury, the interest will be forfeited upon foreclosure proceedings in the state where the land is located.

**CONDITIONS PRECEDENT—NONPERFORMANCE OF CONDITIONS PRECEDENT—EXCUSE.**—An allegation that the opposite party refuses to permit performance of conditions precedent is not equivalent to an allegation of performance, nor can the repudiation of a contract by one party be held equivalent to performance, or a legal excuse for nonperformance, by the other, of conditions precedent so as to authorize recovery as for performance of such conditions precedent.

**PLEADINGS.—USURY IN AND PAYMENTS UPON** a note secured by mortgage, when the amounts claimed are less than the mortgage debt, are matter of defense proper and not for a cross-bill.

**PRACTICE.—AN IRREGULARITY IN CHANCERY PRACTICE** committed by consent of parties is not a ground for reversal.

On November 14, 1891, complainant below, Kyle, filed a bill, in the circuit court praying the foreclosure of a mortgage, on real estate in that county, given to secure a note for two thousand nine hundred and thirty-two dollars, executed by defendants on January 18, 1890, and payable in Birmingham, Alabama, April 10, 1890. In her plea defendant, Della K. Thomson, alleged that the note and mortgage were executed in Alabama; that the debt was her husband's debt exclusively; that the property mortgaged was her separate property; that she executed the mortgage as security only; that under the laws of Alabama such obligation was null and void, and hence, being incapable of enforcement in Alabama, was likewise void and incapable of enforcement in Florida. This plea was overruled. Defendant, John M. Thomson, in his answer alleged that the note above mentioned contained an item of three hundred dollars interest for less than one year on six hundred dollars loaned him by appellee in the state of Alabama; that according to the laws of Alabama such interest being in excess of eight per cent, the legal rate, was usurious and forfeited all interest; that said note included an item of one hundred dollars charged for an advance of eighteen hundred and twenty dollars in excess of the legal rate on said loan. All these transactions occurred in Alabama. Defendant claimed two payments on the indebtedness, to wit: One of two hundred and sixteen dollars and sixty-six cents made for him by one Rankin Roberts, May 1, 1890, and one of four hundred dollars, made for him by one S. T. Taylor, May 15, 1890. Defendant then set forth various transactions and settlements arising out of, and in connection with, the business of the Bir-

mingham Safe and Lock Company, which led to an agreement made September 12, 1891, between the complainant and defendants. The complainant filed exceptions to each matter of defense set forth in the answer. All the exceptions except the ones referring to the allegations of the payments were sustained. After issue joined, the court by consent of parties appointed a special master to take testimony and make an accounting. The master's report showed an amount due on the debt for principal, interest, and attorney's fees to be four thousand and ninety-six dollars and sixty cents. Defendants excepted to the report on the ground that it was premature, as there was no interlocutory decree settling the equities of the case. The exceptions were overruled and the court confirmed the special master's report, and entered a decree of foreclosure and sale. The property mortgaged sold for two thousand dollars and the master reported a deficiency of two thousand three hundred and six dollars and eighty-three cents, for which amount the court entered a deficiency judgment. It was argued that the court below had erred in sustaining the demurrer to and dismissing the cross-bill, in overruling the plea of defendant Della K. Thomson, in sustaining the exceptions to the answer of defendant J. M. Thomson, in overruling defendants' exception to the master's report and in rendering decree for four thousand and ninety-six dollars and sixty cents.

Thomas E. Bugg, for the appellants.

W. W. Hampton, for the appellee.

**592** CARTER, J. 1. The question presented by the plea of Della K. Thomson is an interesting one, and one upon which the authorities are not in entire accord. It is not denied by appellants that had the mortgage sought to **593** be foreclosed in this case been executed in this state, it would have been valid and enforceable under our laws. Indeed, it has been held by this court, on more than one occasion, that a mortgage properly executed by a married woman and her husband, conveying the wife's separate statutory real estate as security for her husband's debt, is valid: *Dzyialynski v. Bank of Jacksonville*, 23 Fla. 346; *Ballard v. Lippman*, 32 Fla. 481. It is insisted, however, that under the laws of Alabama a married woman is without capacity to bind herself or her property as security for the debt of her husband, and as the mortgage sought to be enforced in this case was executed, and the debt secured thereby was payable in that state, and all the parties were there domiciled, that those laws necessa-



riily entered into and became a part of the contract rendering it void in that state; and that, being void in Alabama, it is by virtue of interstate law, void in Florida. It may be admitted that this argument has strong application to the note executed by Mrs. Thomson with her husband, which the mortgage was given to secure, for the note being a general personal obligation, if void by the laws of the state in which it was executed and made payable, it ought likewise to be void in every other state where it is sought to be enforced. But it does not follow that because Mrs. Thomson is not bound by the note it is for that reason totally void. It still remains a valid obligation of her husband which she can in this state secure by a mortgage of her separate statutory property: *Dzyialynski v. Bank of Jacksonville*, 23 Fla. 346. We do not understand that any principle of interstate law requires us to test the validity or sufficiency of conveyances<sup>504</sup> of, or liens upon, real estate in this state by the laws of other states or nations, even though such contracts may have been executed, or given to secure the performance of some act, within their jurisdiction. The reasons why we should not are obvious. The subject matter, with reference to the title of which the conveyance or lien is executed, being at the time of such execution an immovable thing, not only located beyond the control of that sovereignty within whose jurisdiction the contract is executed, and forever so to remain, but then within the exclusive jurisdiction of another independent sovereignty, and forever so to remain, the parties to such conveyance are presumed to have contracted, at least so far as the immovable thing is concerned, with reference to the laws of that jurisdiction within whose borders the thing is situated. And no sovereign state, without express legislative sanction, is presumed to surrender to owners of immovable property within its limits the power to encumber or change the title thereto in any other manner than that pointed out by its laws. It is, therefore, almost universally held that so far as real estate or immovable property is concerned, we must look to the laws of the state where it is situated for the rules which govern its descent, alienation, and transfer, and for the construction, validity, and effect of conveyances thereof (*United States v. Crosby*, 7 Cranch, 115; *McGoon v. Scales*, 9 Wall. 23; *Brine v. Insurance Co.*, 96 U. S. 627; *Gault v. Van Zile*, 37 Mich. 22; *Bissell v. Terry*, 69 Ill. 184; *West v. Fitz*, 109 Ill. 425; *Fessenden v. Taft*, 65 N. H. 39; *Curtis v. Hutton*, 14 Ves. 537; *Frierson v. Williams*, 57 Miss. 451; *Crolly v. Clark*, 20 Fla. 849; *Frazier v. Bogg*, 37 Fla. 307); and it is<sup>505</sup>

to the same law that we must look for the rules governing the capacity of the parties to such contracts or conveyances, and their rights under the same: *Doyle v. McGuire*, 38 Iowa, 410; *Baum v. Birchall*, 150 Pa. St. 164; 30 Am. St. Rep. 797; *Chapman v. Robertson*, 6 Paige, 627; 31 Am. Dec. 264; *Succession of Larendon*, 39 La. Ann. 952; *Succession of Cassidy*, 40 La. Ann. 827; 2 *Parsons on Contracts*, \*572; *Story on Conflict of Laws*, sec. 431; *Rorer on Interstate Law*, 263. It would seem, therefore, that upon principle the mortgage in this case should be subjected to the laws of this state, in order to ascertain its validity, construction, and the capacity of the parties to execute it, rather than to the laws of the state of Alabama, within whose borders the real estate is not situated, and as to which her laws can have no extraterritorial effect. While a contrary opinion was entertained in Ohio (*Evans v. Beaver*, 50 Ohio St. 190; 40 Am. St. Rep. 666), it has been held in several well-considered cases that although by the laws of the state of a married woman's domicile she has no capacity to execute a mortgage upon her separate estate as security for the debt of her husband, yet if she in that state executes a mortgage of that character upon real estate situated in another state whose laws permit a married woman to mortgage her property to secure such a debt, the mortgage will in the latter state be held valid, and enforceable in its courts by appropriate proceedings: *Post v. First Nat. Bank*, 38 Ill. App. 259; affirmed in 138 Ill. 559; *Cochran v. Benton*, 126 Ind. 58; *Johnston v. Gawtry*, 11 Mo. App. 322. See, also, *Frierson v. Williams*, 57 Miss. 451; *Goddard v. Sawyer*, 9 Allen, 78; *Swank v. Hufnagle*, 111 Ind. 453, where the same principles were applied to a different state of facts. We hold that, notwithstanding *Mrs. Thomson's* incapacity by the laws of Alabama to execute the mortgage sought to be foreclosed here, she was capable under our laws of executing in Alabama, a mortgage upon her separate statutory real property in this state to secure her husband's debt, and that her plea was properly overruled. This conclusion also disposes of those portions of the cross-bill and answer of the defendant John M. Thomson which cover the same matters as this plea.

2. The answer and cross-bill of the defendant John M. Thomson alleged that there was included in the obligation evidencing the mortgage debt the sum of three hundred dollars which, under the laws of the state of Alabama was usurious interest, and that under the laws of that state usury forfeited all interest upon the principal

debt as to which unlawful interest was charged. As this obligation was a personal one, and it was executed and to be performed in the state of Alabama, having no reference to immovable property in this state, we think its validity and interpretation are governed by the laws of the former state: *Perry v. Lewis*, 6 Fla. 555. Therefore, although in this state there were no laws against usury at the time of the execution of this obligation, yet if it is tainted with usury by the laws of Alabama, where it was executed, and made payable, and where all the parties resided at the time of its execution, we think the infirmity follows it to this state, even when secured by a mortgage on lands in this state. The authorities are not entirely unanimous on this point, but we think the weight of <sup>597</sup> them, supported by principle, sustains the proposition that a note executed and payable in one state, though secured by a mortgage on lands in another, will be governed as to the rate of interest it shall bear by the laws of the former; and if by such laws all interest is forfeited for usury, the same result will follow, upon foreclosure of the mortgage securing it, in the state where the mortgage lands are situated: 1 *Jones on Mortgages*, sec. 657; 2 *Parsons on Contracts*, \*585; *Story on Conflict of Laws*, sec. 305; *Rorer on Interstate Law*, 110 et seq.; *Arnold v. Potter*, 22 *Iowa*, 194; *Maynard v. Hall*, 92 *Wis.* 565; *DeWolf v. Johnson*, 10 *Wheat.* 367; *Call v. Palmer*, 116 *U. S.* 98.

3. We think the rulings of the circuit court upon those portions of the answer and cross-bill of the defendant John M. Thomson, relating to transactions and settlements arising out of and in connection with the business of the Birmingham Safe and Lock Company, were correct. The appellants say in their brief that these matters were not introduced into the cross-bill and answer for the purpose of obtaining any settlement thereof, but only to show that in connection with a transfer of stock in said company the note and mortgage now sought to be foreclosed were treated of in such a way as to show that complainant is now debarred of the relief sought by foreclosure of the mortgage. As appellants have confined their argument to this statement of their claim, we shall consider that question only, without expressing an opinion as to whether the items claimed in the cross-bill as setoffs to the mortgage debt can, either by answer or cross-bill, be available as such in an equitable proceeding to foreclose the mortgage.

<sup>598</sup> It was distinctly averred in the cross-bill, as well as the answer, that the agreement entered into between the complain-



ant and the defendants on September 12, 1891, was the result of negotiations for a final settlement of all matters between the parties, but that the complainant declined to permit the note and mortgage now sought to be enforced to be included in such settlement. By the terms of the agreement of September 12, 1891, the complainant became the owner of all the stock and plant of the Safe and Lock Company, and the defendant John M. Thomson retained an option authorizing him to sell the Safe and Lock Company's business at not less than twenty-five thousand dollars, which amount complainant was to accept in full of all demands against defendant, release all claims to the capital stock and plant of the company, and allow defendant as commissions for making such sale any amount realized therefrom in excess of twenty-five thousand dollars, and in addition the note and mortgage involved in this suit. It is very clear that this agreement did not regard the note and mortgage as settled; on the contrary, it was thereby recognized as a valid existing obligation. It is nowhere averred that the defendant secured, or tried to secure, a purchaser for the Safe and Lock Company's property, or that he could have secured one within the reasonable time contemplated by his option. The sale of this property by defendant at not less than twenty-five thousand dollars was a condition precedent on his part to his right to recover commissions or to a surrender of the note and mortgage; and in regard to conditions precedent it is an elementary rule of law that there must be at least a substantial performance thereof in order to authorize a recovery as for performance of the contract. An allegation that the opposite party refuses to <sup>599</sup> permit performance of conditions precedent is not equivalent to an allegation of performance (*Myrick v. Merritt*, 22 Fla. 335); and especially is this true where the complaining party, as in this case, does not allege his willingness and ability to perform at the time of such refusal, or at any time prior to the expiration of the period fixed for performance. It is true that an absolute repudiation of his part of a contract by one of the parties thereto prior to the time fixed by the contract for performance of the agreement of the other party, or while the contract is being performed by such other within the time limited, will entitle such other party to an action for damages as for a breach of the contract (*Myrick v. Merritt*, 22 Fla. 335; *Sullivan v. McMillan*, 26 Fla. 543); but in this case the defendant does not allege or claim any damage to him arising from the complainant's alleged repudiation of the contract, and in no case can a repudiation of a contract by one party be held equivalent

to performance, or a legal excuse for nonperformance by the other party of conditions precedent, so as to authorize recovery as for performance of such conditions precedent.

4. The questions of usury in, and payments made upon, the note and mortgage sought to be foreclosed were matters of defense proper to be pleaded in defendant's answer (1 Beach's Modern Equity Practice, sec. 349; Wiltsie on Mortgage Foreclosure, secs. 344, 411), and for that reason improper to be exhibited by cross-bill, as the amounts so claimed were alleged to be less than the mortgage debt: *Sanderson v. Sanderson*, 17 Fla. 820; *Sammis v. L'Engle*, 19 Fla. 800.

5. The exceptions of defendants to the special master's report were properly overruled. The reference <sup>600</sup> decree authorized the master "to take testimony and make an accounting," and this decree was entered by express consent of the defendants. If, in practice, it be irregular to refer a chancery cause for an accounting prior to an interlocutory decree settling the equities, as contended by defendants, this irregularity in the present case was committed by defendants' consent, and they are, therefore, in no situation to insist upon it for a reversal of the final decree.

6. We think the court below should have allowed as credits upon the mortgage debt the payments claimed by defendants to have been made thereon by Roberts and Taylor. The defendant John M. Thomson testified positively that the complainant had admitted to him that he had collected the amount claimed from Roberts, and that Taylor paid complainant the money claimed to have been paid by him in defendant's presence in May, 1890. The complainant does not deny collecting the amounts claimed from Roberts and Taylor, nor does he deny telling defendant that he had collected the amount claimed from Roberts. He does not state when these collections were made, but says that all amounts collected by him from Taylor and Roberts were accounted for by him to defendant at a settlement between them dated January 18, 1890. That in this settlement all unsecured claims against defendant were included, and the collections from Roberts and Taylor were accounted for, and the note and mortgage sought to be foreclosed were given for the balance due upon such settlement. It is quite evident that complainant is mistaken as to these collections being included in that settlement, because his receipt to defendant for the notes of Rankin Roberts, upon which the collection from Roberts claimed as a <sup>601</sup> payment was made, is dated January 28, 1890, ten days after the complainant claims to have accounted for the collection from

Roberts. This receipt expressly states that the proceeds of the Roberts notes when collected are to be placed to the credit of John M. Thomson's indebtedness to complainant.

7. The appellee states in his brief that he is willing to remit the amounts found by this court proper to be deducted on account of usury, according to the allegations of the answer of the defendant John M. Thomson, in case this court is of opinion that the circuit court ought to have allowed the defense of usury in this case. We are of opinion that the court should, under the allegations of the answer, have deducted from the mortgage debt the sum of three hundred dollars claimed to have been usurious, together with all interest upon that sum and upon the six hundred dollars principal debt upon which the said sum of three hundred dollars usurious interest was charged. It was not alleged in the answer or cross-bill that the one hundred dollars charged for advancing the eighteen hundred and twenty dollars, was illegal interest or usurious according to the laws of the state of Alabama. We think, therefore, that the exceptions to this item in the answer were properly sustained: 1 Beach's Modern Equity Practice, sec. 349, and notes. The final decree includes interest at eight per cent upon the mortgage debt to the date of the decree. The usurious item of three hundred dollars with all interest upon same, and all interest upon the six hundred dollars above mentioned, should have been excluded from, and the payments made, viz: Two hundred and sixteen dollars and sixty-six cents, May 1, 1890, and four hundred dollars, May 10, 1890, should have been duly credited to the mortgage debt in computing the amount due thereon for the final decree of foreclosure. The usurious item and the interest to be deducted on account thereof at the date of the final <sup>602</sup> decree of foreclosure amounted to five hundred and sixty-four dollars and eighty cents; the payments with interest to the date of the decree, amounted to seven hundred and eighty-one dollars and seventy-four cents, a total of thirteen hundred and forty-six dollars and fifty-four cents. We think this sum is proper to be deducted from the amount of the decree of foreclosure, and will modify same to that extent.

It will, therefore, be ordered that the decree of foreclosure, dated September 22, 1893, be modified so that the amount therein decreed to be due for principal, interest and attorney's fees upon the mortgage debt at the date of the decree will be two thousand seven hundred and fifty dollars and six cents, instead of four thousand and ninety-six dollars and sixty cents, and as modified



that decree will be affirmed: *Garvin v. Watkins*, 29 Fla. 151; *Price v. Boden*, 39 Fla. 218. The money decree for deficiency, entered January 25, 1894, is reversed, with directions to the circuit court to enter judgment for the proper amount of such deficiency, taking as a basis for estimating same the decree of foreclosure as modified by this court.

The appellee will be taxed with the costs of this appeal.

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**MORTGAGE—VALIDITY OF—CONFLICT OF LAWS.**—The decisions respecting the place of a contract consisting of the borrowing and lending of money, and the taking of an obligation for its repayment, are not harmonious. The general tendency of the authorities where a loan is secured by a mortgage is to regard the contract, at least in so far as it is attempted to be enforced against the mortgaged premises, as a contract of the place where they are situated, though it is by its terms made payable elsewhere: *Monographic note to McGarry v. Nicklin*, 55 Am. St. Rep. 50, 51. Compare *Evans v. Beaver*, 50 Ohio St. 190; 40 Am. St. Rep. 666; and *Baum v. Birchall*, 150 Pa. St. 164; 30 Am. Rep. 797, and note.

**USURY—CONFLICT OF LAWS.**—If a note and mortgage of lands situated in one state are made and executed in another state, usury cannot be set up as a defense to an action thereon in the former state, provided the interest contracted to be paid is legal under the laws of the state where the contract was made: *Pioneer Savings etc. Co. v. Cannon*, 96 Tenn. 599; 54 Am. St. Rep. 858. But the doctrine of the principal case is the better one, and is supported by *Meroney v. Atlanta etc. Assn.*, 116 N. C. 882; 47 Am. St. Rep. 841; *Thornton v. Dean*, 19 S. C. 583; 45 Am. Rep. 796. Compare with the principal case, *Milliken v. Pratt*, 125 Mass. 374; 28 Am. Rep. 241.

**CONTRACTS — CONDITIONS PRECEDENT — PREVENTION OF PERFORMANCE.**—It is held that conditions precedent on plaintiff's part must be performed and proved to entitle him to recover on a contract: *Eldridge v. Rowe*, 2 Gilm. 91; 43 Am. Dec. 41. He cannot recover a quantum meruit in an action of covenant after having failed to prove performance of a condition precedent: *Morford v. Mastin*, 6 T. B. Mon. 609; 17 Am. Dec. 168. A right depending upon a condition precedent does not accrue unless the condition is performed, although performance becomes impossible by the act of God: *Mizell v. Burnett*, 4 Jones, 249; 69 Am. Dec. 744. But one who prevents, or makes impossible, the performance of a condition, cannot take advantage of its nonperformance: *Cape Fear etc. Nav. Co. v. Wilcox*, 7 Jones, 481; 78 Am. Dec. 260. See *Hunt v. Test*, 8 Ala. 713; 42 Am. Dec. 659; *Rankin v. Darnell*, 11 B. Mon. 30; 52 Am. Dec. 557.

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## CITY OF TAMPA v. KAUNITZ.

[39 FLORIDA, 683.]

**TAXATION—ASSESSMENT, WHO MAY MAKE.**—It is essential to the validity of a tax that the assessment be made by the officer authorized by law to make it. He must be either an officer de jure or de facto.

**OFFICER DE FACTO, WHO IS NOT.**—A person employed by a city council to aid an assessor in making an assessment, is not

an officer de facto, but merely an employé, and an assessment made by such assistant is void.

**TAXATION—EXEMPTION BY CITY.**—No city or town has power by contract, or otherwise, to exempt property from taxation.

**ASSESSMENT—ILLEGAL ACT—FRAUD—GOOD FAITH.** An illegal act done with a fraudulent purpose avoids an assessment. An illegal act committed in good faith will not avoid an assessment. A legal assessment with an improper motive is not an assessment unlawfully made.

**PRACTICE—ERROR—JUDGMENT ON DEMURRER.**—Where a statute requires proof of allegations, judgment on demurrer without proof is erroneous.

The defendant in error, Kaunitz, a resident taxpayer in the city of Tampa, in his petition alleged: That the city had, in 1896, a duly appointed and qualified assessor; that during that year said assessor performed none of the duties connected with the assessment; that by virtue of a resolution of the city council the finance committee employed one S. L. Biglow to aid the assessor in making the city assessment for 1896; that said Biglow made the assessment, and the legal assessor had nothing to do with it; that the city of Tampa by contract with the Tampa Bay Hotel Company, exempted that company from all taxes save two hundred dollars; that by ordinance the city of Tampa had exempted the property of a certain railroad, and also certain property of the Tampa Water Works Company from city taxation; that said property was not exempt from taxation by the constitution and laws of Florida; that in order to make the assessment apparently valid the city assessor placed the assessment of the Tampa Bay Hotel Company's property, of the railroad property above mentioned, and of the water works company's property above mentioned upon the assessment-roll, but with the exception of the two hundred dollars paid by the said hotel company, no taxes had been collected upon such assessments; that in 1896 property to the value of six thousand dollars was omitted entirely from the assessment-roll; that by reason of these irregularities and exemptions the assessment of 1896 was unconstitutional, illegal, and void. The petitioner prayed that the court declare the said assessment unconstitutional, illegal, and void. The city of Tampa demurred upon various grounds, the substance of which is stated in the opinion of the court. The court overruled the demurrer; and the defendant refusing to answer, the court entered judgment on the demurrer to the effect that the assessment was unlawful.

William Hunter, for the plaintiff in error.

F. M. Simonton, for the defendant in error.

<sup>693</sup> CARTER, J. The assignments of error complain: 1. That the court erred in overruling the demurrer to the petition; 2. That the court erred in declaring the assessment of petitioner's property unlawfully made.

1. We think a proper consideration of all substantial questions suggested by the demurrer to the petition can be had by ascertaining: A. Whether the assessment for taxes of 1896 was void because made by Biglow, instead of the auditor of the city of Tampa; B. Whether the city of Tampa had power, by contract or otherwise, to exempt from taxation the various properties alleged in the petition; C. Whether the <sup>694</sup> exemptions of taxable property by the city, the omissions of taxable property from its tax rolls, and the placing thereon of property legally taxable, in order to make the rolls apparently valid, but with no intention on the part of the city of collecting the taxes due thereon, will justify a court in setting aside the whole assessment in a proceeding by petition under our statute, section 1542 of the Revised Statutes.

A. We think the first question must be answered affirmatively. Section 4, chapter 4496, approved May 29, 1895, being the present charter of the city of Tampa, provides that "the government of said city shall be carried on by the following officers: A mayor, eleven councilmen, a marshal, a clerk, a treasurer, a municipal judge, a tax collector, and auditor who shall also be assessor of taxes, a chief of the fire department, and such other officers as may be created by ordinance of the city not inconsistent herewith, and all of said officers shall be qualified electors of said city of Tampa, and shall perform such duties and receive such compensation as may be prescribed by ordinances of the city of Tampa, not inconsistent with the provisions of this charter." By section 10 it is provided that the mayor shall, by and with the consent of the city council, appoint some suitable person to be called the auditor of said city, who shall also act as assessor of said city, who shall give such bond as the council may direct and whose duty and compensation shall be fixed by ordinances, except as herein provided. Section 31 makes it the duty of the tax assessor of the city, between April 1st and July 1st of each year, to ascertain by diligent inquiry all taxable personal property and all taxable real estate in the city and the names of the persons owning same on April 1st in each year, and to <sup>695</sup> make an assessment of all taxable property. It requires him to visit and inspect all real estate and affix a valuation thereon, and he is to require the owners of personal property to return and value same under



oath, which he is authorized to administer, and any person refusing to make such oath is not permitted afterward to reduce the valuation of such personal property for that year. By section 34 the assessor is required to value all personal property not returned under oath according to his best judgment and information. Other provisions of the charter require the assessor to make out assessment rolls in the manner specified therein, to meet with the city board of equalization on the first Monday in July of each year, for the purpose of reviewing the assessment rolls, to calculate and carry out the several amounts of taxes, after the amount to be raised has been determined, and after completing the rolls to append to them an affidavit as to the correctness of the rolls and of the valuations of property made by him, and to issue and attach to the original roll a warrant in the form prescribed by section 38, commanding the tax collector to collect the taxes therein by sale of the assessed property. The charter of the city having expressly committed these duties relating to the assessment of taxes to the auditor, the city had no power to transfer them to any other person: *Tampa v. Salomonson*, 35 Fla. 446. We do not understand that the resolution of the city council, referred to in the petition, undertook to transfer the duties of tax assessor from the auditor to the persons authorized to be employed by the finance committee. The persons so employed were merely assistants to the auditor in making the assessment. No new office was attempted ~~696~~ to be created by this resolution, nor did the resolution attempt to authorize the employé to make the assessment exclusively of the auditor. Biglow, the employé under this resolution, did not pretend to be the rightful auditor or assessor of the city. He did not attempt to oust the legal incumbent of these offices, nor did he assume to be the rightful occupant thereof. Biglow was not an officer, nor did he pretend to be an officer of the city. He was a mere employé of the council, having and claiming no other or higher rights or duties than those of an assistant to the auditor in the matter of making city assessments of taxes. Biglow was not, therefore, an officer de facto whose acts as such would be valid as to third persons, as was the case in the *Kissimmee City v. Cannon*, 26 Fla. 3: 1 *Blackwell on Tax Titles*, sec. 170; *Cooley on Taxation*, 251; *Mechem on Public Officers*, secs. 319, 321; *Black on Tax Title*, sec. 93; *Birch v. Fisher*, 13 Serg. & R. 208; *Hawkins v. Jonesboro*, 63 Ga. 527; *Paldi v. Paldi*, 84 Mich. 346; *Farrington v. New England etc. Co.*, 1 N. Dak. 102; *Bailey v. Fisher*, 38 Iowa, 229; *Munson v. Minor*, 22 Ill. 595. We think it is ab-

solutely essential to the validity of a tax levy, that the assessment be made by the officer authorized by law to make it. The person making the assessment must be that officer, either *de jure* or *de facto*. We do not mean to intimate that the officer must personally perform every act connected with the assessment and the making of the tax roll. Many of these acts are of a clerical nature, involving no exercise of discretion, and having no relation to any right of the taxpayer. A very large portion of these duties consists in transcribing <sup>697</sup> upon the rolls the various assessments, and in calculating the amounts of taxes levied thereon. The assessor may call to his assistance the services of other persons, whether officers or not, in the performance of all clerical or ministerial duties, and the assessment will not be invalid for that reason if the work of others is done under his supervision, or is ratified or adopted by him. But if the assessor, either from neglect or because of other pressing duties devolving upon him, permits his assistants to perform all the duties relating to the assessment for a whole tax year, while he abstains from any duty connected therewith, an assessment so made will be utterly void, and it is the duty of the courts to so declare it. The reasons are succinctly stated by Mr. Blackwell (1 Blackwell on Tax Titles, sec. 168) as follows: "The statute being the authority, and the officer the agent to execute it, and no one being empowered to do the act except the person specially designated in the law for that purpose, it follows that a stranger to the power cannot execute it. The power is conferred upon the officer, not the man. It is an official, not a personal trust. It does not rest upon confidence, but upon official responsibility. Hence the only security of the proprietor of the estate is the official character of the person to whom the power is committed. This security mainly depends upon the responsibility of the officer to the government, the sanctity of his oath of office, and his liability to those whose rights are violated by his wrongful acts. . . . The citizen is entitled to all the protection against fraud, rapacity, and abuse of authority, in the sale of his property, which official responsibility can secure." The petition distinctly avers that the auditor or assessor performed no "duties whatever connected <sup>698</sup> with the assessment of taxes for the city of Tampa during the year 1896"; that "the said assessment was made by the said Biglow exclusively and that the legal assessor of the city of Tampa had nothing whatever to do with the assessment aforesaid." If these allegations are true, the assessment of petitioner's personal as well as real property was void: Welty on Assessments, sec. 10; Cooley on Taxa-

tion, 248; Black on Tax Titles, sec. 92; Stokes v. State, 24 Miss 621; Munson v. Minor, 22 Ill. 595; Ferris v. Coover, 10 Cal. 589; People v. Hastings, 29 Cal. 449; People v. White, 47 Cal. 616; Farrington v. New England etc. Co., 1 N. Dak. 102; Snell v. Fort Dodge, 45 Iowa, 564. The allegations of the petition being sufficient to show that the assessment was void because made by an unauthorized person, we would ordinarily affirm the judgment without expressing an opinion upon the two other propositions stated in the beginning of this paragraph, but as the judgment must be reversed upon another ground, and these questions will arise in the further progress of the case, we will proceed to consider them here.

B. Did the city of Tampa have power by contract or otherwise to exempt from taxation the properties of the South Florida Division of the Savannah, Florida, and Western Railway Company, and the Tampa Water Works Company, and to perpetually bind itself to accept from the Tampa Bay Hotel Company two hundred dollars per annum in full for all city taxes, without regard to the value of its property or the rate of taxation levied thereon? The plaintiff in error cites us to no authorities on this point. He plants himself upon the proposition that the exemptions were granted for a consideration, and that consequently they amounted to a contract with <sup>699</sup> the city. But where does the city derive its authority to make such a contract? We have not been cited to any statute of this state authorizing the city to exempt this species of property from taxation, nor to make a contract so to do. Without valid legislative authority, no city or town has power to bind itself by contract, either to forbear to impose taxes on particular property, or to impose them only under given limitations, or on certain given conditions: Black on Tax Titles, sec. 63; Cooley on Taxation, 200; 1 Blackwell on Tax Titles, secs. 110, 117.

C. Some courts have held that the intentional omission of taxable property from the assessment roll, under the bona fide belief of the assessor that such property was exempt from taxation, the effect of which omission was to increase the amount of taxes to be paid by other taxpayers, would render the entire assessment void: Weeks v. Milwaukee, 10 Wis. 242; Johnston v. Oshkosh, 65 Wis. 473; Altgelt v. San Antonio, 81 Tex. 436. Other courts hold that such omissions, even if made willfully, or as the result of carelessness, cannot be urged to defeat taxes otherwise properly assessed; that in such cases the officers may make themselves amenable to the law for misconduct in office, but such conduct cannot "stop the wheels of government" by defeat-



ing the collection of taxes: *Dunham v. Chicago*, 55 Ill. 357; *Van Deventer v. Long Island City*, 139 N. Y. 133. We think tax officers like all others are required to exercise good faith in performing their official duties. They should not use their official position, or official discretion, as a cover for fraudulent conduct in unequally and inequitably <sup>700</sup> adjusting the burdens of taxation. For it is a salutary principle of law, which runs through all its branches, that fraud vitiates and annuls everything which it touches. If, therefore, tax officers intentionally commit an illegal act with a fraudulent purpose in view, as where taxable property is intentionally omitted for an improper purpose, we have no doubt that the entire assessment is illegal and void. If, however, the omission to assess taxable property arises in consequence of a bona fide belief on the part of the taxing officers that the omitted property is exempt from taxation, or results from inadvertence or negligence, without any intent on their part to impose additional or unequal burdens upon other taxpayers, the assessment will not be held to be void: *Farrington v. New England etc. Co.*, 1 N. Dak. 102; *McTwiggan v. Hunter*, 19 R. I. 265; *Keokuk etc. Bridge Co. v. People*, 161 Ill. 514; *Cooley on Taxation*, 214-217; *Black on Tax Titles*, sec. 217. The petition nowhere alleges that any property was omitted from the city rolls of 1896, in bad faith or from any fraudulent purpose. In fact, the argument of defendant in error in this court is principally directed to property assessed upon the roll, and not to omissions therefrom. It is insisted that the property of the Tampa Bay Hotel Company, and of the South Florida Division of the Savannah, Florida, and Western Railway Company, was placed upon the city rolls for an improper purpose, viz: to deceive the public, and make the city roll apparently valid, with no intention of collecting the taxes due upon it. It is not denied that this property was regularly and validly assessed, and the taxes due thereon properly extended <sup>701</sup> against it. It is not claimed that this conduct had any relation to the individual assessment against petitioner, nor that he was personally affected thereby in any other or different manner than all other taxpayers whose property was assessed upon the roll for that year. If the petitioner's assessment was illegal on that account, the entire assessment was likewise illegal. However reprehensible in morals the auditor's conduct may have been in assessing the property complained of, with an improper motive, he was, nevertheless, performing his official duty when he assessed it, and as the assessment, had it been made from good motives, would have been

valid, because conforming to law, we cannot say that it was invalid simply because it was made from bad motives. The law cannot descend to an inquiry into the motives of an officer who performs an official act in strict accordance with its command. This being true, we cannot hold the assessment "not lawfully made," because the officer rightfully and legally assessed property subject to taxation, even if he assessed it with a fraudulent motive. The fact that the city collector failed to collect taxes legally assessed, or accepted a less sum than actually due in full settlement of taxes legally assessed, cannot render other legal assessments amenable to the remedy given by our statute, even though such conduct be authorized by the city council, because such illegal acts do not relate to the making of the assessments, but to the collection thereof. Our statute, as will be seen by reference to its language, given in the next succeeding paragraph, does not undertake to give a remedy coextensive with the powers of a court of equity to prevent the collection of taxes, but is confined entirely and exclusively to "illegality" of assessments, <sup>702</sup> and authorizes the court to "declare the assessment not lawfully made," "if found to be illegal." All inquiries upon a petition under this statute must be confined to illegalities in the assessment, and they cannot be directed to other grounds of complaint against the enforcement of taxes as to which the assessment was lawfully made: *Shear v. Commissioners*, 14 Fla. 146.

2. Although the demurrer to the petition was properly overruled, for the reasons given in the first part of this opinion, we think the court erred in rendering final judgment upon the demurrer, without requiring proof of the allegations of the petition. It is true that the proper practice upon overruling a demurrer in ordinary cases is to enter final judgment upon the demurrer, where the party demurring declines to plead further. But this proceeding by petition is special and summary, and it is authorized as well as regulated by the provisions of section 1542 of the Revised Statutes, reading as follows: "In all cases where assessments are made against any person, body politic or corporate, and payment of the same shall be refused upon allegation of the illegality of such assessment, such person, body corporate or politic, may apply to the judge of the circuit court by petition setting forth the alleged illegality, and present the same, together with the evidence to sustain it, and the judge shall decide upon the same, and if found to be illegal shall declare the assessment not lawfully made." It was not the inten-

tion of this section to permit a court in this summary manner to relieve a taxpayer from his assessments upon allegations merely. It requires the court to act upon proof. To entitle one to the benefit of its provisions he must proceed substantially <sup>703</sup> in accordance with its terms. No proof was presented to the judge in this case. The alleged ordinances and contracts attached to the petition were not certified; many of the most important allegations in the petition were alleged upon information and belief, and the affidavit attached to the petition as to these matters merely alleged a belief that they were true. This was not the proof contemplated by the statute. It follows from these views that the demurrer was properly overruled, because the assessment was made by an unauthorized person, but the final judgment was erroneous, because entered without proof.

The judgment is reversed for further proceedings consistent with law and this opinion.

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#### TAXES—POWER TO LEVY—VALIDITY OF ASSESSMENT.—

Taxation is a legislative right and duty which must be exercised by the legislature, or under the authority of laws passed by it: *Sharpless v. Mayor*, 21 Pa. St. 147; 59 Am. Dec. 759. A de facto government may exercise the taxing power: *O'Byrne v. Mayor*, 41 Ga. 331; 5 Am. Rep. 532. If the law relating to the levy of a tax is not strictly pursued by the officers, the tax will be void, and cannot be enforced by a sale of the property upon which it is levied: *Mayor v. Porter*, 18 Md. 284; 79 Am. Dec. 686. Thus an assessment by assessors not sworn as required by law is illegal: *First Parish v. Fiske*, 8 Cush. 264; 54 Am. Dec. 755. But courts will not be quick to declare assessments invalid: *Smith v. Smith*, 19 Wis. 615; 88 Am. Dec. 707; *Mills v. Gleason*, 11 Wis. 470; 78 Am. Dec. 721; *Horse etc. R. R. Co. v. Donoghue*, 127 Ill. 27; 11 Am. St. Rep. 90.

**MUNICIPAL CORPORATIONS—POWER OF TAXATION—EXEMPTIONS.**—A municipal corporation has no inherent power to exempt from taxation any property which by its charter it is authorized to tax: *Whiting v. West Point*, 88 Va. 905; 29 Am. St. Rep. 750; *Springfield v. Smith*, 138 Mo. 645; 60 Am. St. Rep. 569, and note.

**OFFICERS—WHO ARE—DE FACTO OFFICERS.**—The question as to what constitutes a public office is the subject of the monographic note to *State v. Hocker*, 39 Fla. 477, ante, p. 174. A de facto officer is one who acts under color of a known and valid appointment, but has failed to conform to some precedent requirement, as to take an oath, give a bond, or the like: *Weatherford v. State*, 31 Tex. Cr. Rep. 530; 37 Am. St. Rep. 828. For instances of de facto officers and persons held not to be such, see *Alabama etc. Ry. Co. v. Bolding*, 69 Miss. 255; 30 Am. St. Rep. 541; extended note to *Hildreth v. McIntire*, 19 Am. Dec. 63-69. A mere intruder into an office, acting without color of right and without recognition by the public cannot be regarded as an officer de facto: *Dabney v. Hudson*, 68 Miss. 292; 24 Am. St. Rep. 276, and note.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ILLINOIS.**

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**ORCHARDSON v. COFIELD.**

[171 ILLINOIS, 14.]

**WILLS—EVIDENCE OF TESTAMENTARY CAPACITY.**—Capacity to transact ordinary business, and to know and understand the business in which one is engaged at the time of making a will, is evidence of testamentary capacity, unless the testator was, at that time, affected with some insane delusion which influenced his action.

**WILLS—INVALIDITY—INSANE DELUSIONS.**—If a will is made as the result of an insane delusion in regard to one who is an object of the testator's bounty, or in regard to the duty or moral obligation of a party to make a will in favor of a particular individual, corporation, or society, it cannot be sustained.

**WILLS—INVALIDITY—INSANE DELUSIONS—SPIRITUALISM.**—A mere belief in spiritualism is not proof of insanity or want of testamentary capacity, yet, if through that belief, one is led into the delusion that another is a god, a Christ, or gifted with supernatural powers, the believer of the delusion is insane on that subject, and his will, prompted by such delusion, and made under its influence, cannot be sustained, although the testator may have been sane on all other subjects.

**WILLS—INVALIDITY—INSANE DELUSIONS—SPIRITUALISM.**—If a man, fifty-seven years of age, professing to be a spiritualist, leads a feeble woman, eighty-three years of age, possessed of an abundance of money and other property, to believe that he is a god, a Christ, or one gifted with supernatural powers, and she marries him under the insane delusion that the spirit of her dead husband, long deceased, dictates and approves of the marriage, and makes a will in such impostor's favor while she labors under the influences of such insane delusions, brought upon her through his machinations, a court will set the will aside.

**MARRIAGE—INVALIDITY—INSANE PERSONS.**—The marriage of an insane person is void, and its invalidity may be shown in any court, and between any parties, either in the lifetime of the parties thereto or after their death.

**MARRIAGE—CEREMONY—CELEBRATION.**—A simple marriage ceremony does not make a man and woman husband and wife. Capacity and consent are absolutely essential, but celebration only contingently so.

**MARRIAGE — INVALIDITY — INSANE PERSONS — EVIDENCE.**—In determining the mental capacity of an alleged insane person to enter into a contract of marriage, the question is not whether his conduct was wise, but whether his mind could, and did, act rationally regarding the precise thing in contemplation—marriage.

**MARRIAGE — INVALIDITY — INSANE PERSONS — EVIDENCE—FRAUD.**—In determining whether a marriage is invalid, because of the wife's mental incapacity at the time of the alleged marriage, the question of fraud is also to be considered with the evidence of mental incapacity where it appears that the marriage in question was brought about and procured by the husband in the accomplishment of his scheme and purpose to obtain possession of his wife's property.

**WILLS—INVALIDITY—INSANE DELUSIONS.**—Although a testatrix may possess sufficient mental capacity to transact ordinary business, and have sufficient mental capacity, at the time she signs her will, to know and understand the business in which she is engaged, yet she is wholly incapable of making a will if, at the time, she is under the influence of an insane delusion.

John H. Williams and Jesse B. Barton, for the appellant.

James N. Sprigg, Govert & Pape, and William L. Vandeventer, for the appellees.

**18 WILKIN, J.** To the October term, 1894, of the circuit court of Adams county, appellees, two of the heirs of Minerva Orchardson (or, as appellees insist, Minerva Merrick), deceased, filed their bill in chancery against appellant and others, to contest the validity of the last will and testament of said Minerva upon the ground of mental incapacity, and that its execution was procured by the said Charles Orchardson through fraud and undue influence, and also to set aside and have declared null and void a marriage which appellant, Orchardson, claimed existed between himself and the said Minerva at the date of her death, on the ground of her mental incapacity to enter into a marriage contract at the time of the alleged marriage, and the fraud of said Orchardson. The defendants, except Orchardson and one William H. Boyd, were also heirs of the testatrix. Orchardson alone answered the bill, and he denied each of its material allegations. Replication being duly filed, the trial and hearing below were upon the issue thus formed. On that branch of the case involving the validity of the will an issue at law was made up whether the writing produced was the will of the testatrix or not, and tried by a jury, resulting in a verdict that it was not. The court also submitted to the jury certain interrogatories for special findings, which they returned with a general verdict, as follows:

1. "Did Minerva Merrick Orchardson, at the time said will pur-

ports to have been signed, possess sufficient mental capacity to transact ordinary business?" Yes.

2. "Did said Minerva Merrick Orchardson, at the time said will was signed by her (if it was so signed) have sufficient mental capacity to know and understand the business in which she was then engaged?" Yes.

3. "Was there any undue influence exercised over Minerva Merrick Orchardson, connected with or operating upon her at the time she executed the will in question, if she did execute it?" Yes.

<sup>19</sup> A motion for new trial was overruled and a decree entered upon the general verdict, setting aside the will and probate thereof. By agreement of the parties the issue as to the validity of the marriage was submitted to the chancellor on the same evidence produced before the jury, with such additional testimony as either party saw fit to introduce, and that issue was also found for the complainant, and a decree entered that the "alleged marriage of Minerva Merrick to the said Charles Orchardson, of date April 9, 1893, was, and remained at and from the time thereof, and is, null and void." From both these decrees Orchardson has prosecuted this appeal.

Several errors are assigned upon the record, but the only grounds of reversal insisted upon are, that the evidence is insufficient to authorize either decree, and that on the issue as to the will the special findings of the jury are conclusive.

The facts found by the chancellor material to a consideration of the first position are as follows: That Minerva Merrick, at the time of her alleged marriage with Charles Orchardson of date April 12, 1893, was of age about eighty-three years; that she had been for several years afflicted with cancer, and her physical health had become poor; that her mind and memory had become greatly weakened and impaired; that she had been a widow since 1876, and lived in her own home, with her servants, in Quincy, Illinois; that she was possessed of a considerable fortune; that from a time shortly after her husband's death, in 1876, she had believed in what was commonly known as "spiritualism," and her views concerning spiritualism had grown upon her in later years, and she had been for some time last preceding her alleged marriage to Charles Orchardson, and was at the time of such alleged marriage, and remained continuously thereafter until her death, on June 11, 1894, a monomaniac on the subject of spiritualism, and insane upon all matters into which the subject of spiritualism entered or which were connected therewith,



and <sup>20</sup> was, and remained during all that time, wholly dominated and controlled by insane delusions, among other things believing she could receive, and did receive, through the intervention of other persons as mediums—not claiming to be in any sense a medium herself—communications, advice, and directions concerning the conduct of her affairs and business from disembodied spirits generally, and particularly from the spirit of her deceased husband, Dr. Marcus Merrick, and was and remained so controlled thereby and by such communications, advice, and directions, and insanely believed it to be her religious and conscientious duty to obey such directions, without heeding the advice of her formerly trusted friends or her counsel, and without consulting or relying upon her own mind and will she followed, obeyed, and acted upon such supposed spirit communications, advice, and directions concerning any matter or matters, and in all matters requiring her attention and action during that time she first submitted, and considered it her duty to submit, to the same, through medium or mediums, for the advice and direction of such supposed spirits as to what her actions should be as to such supposed advice which had been received by her; that preceding said alleged marriage, and during the month of October, 1892, the said Charles Orchardson, then about the age of fifty-seven years—a person substantially without means or property, and a stranger to Mrs. Merrick and to the community in which she lived in Quincy—appeared in Quincy, and within a few days of his arrival inquired for Mrs. Merrick's place of residence, and evinced a knowledge that she was a spiritualist and the wealthy widow of Dr. Marcus Merrick, deceased; that the said Orchardson was then a married man, having a wife living in the state of Michigan, and who, some two months thereafter, procured a divorce from the said Charles Orchardson on account of cruelty; that the said Minerva Merrick was informed of these facts concerning said Charles Orchardson, and also informed that such application had been <sup>21</sup> made also upon the charge that said Orchardson had consorted with a woman notoriously lewd, which woman came with said Orchardson to Quincy, Illinois, and that said information came to said Minerva Merrick some time preceding her alleged marriage to him, and at said time she was also informed that he had consorted in a lewd manner with women after coming to Quincy, and during the time, as hereafter mentioned, in which he was engaged in writing a book at said Mrs. Merrick's house, and said Minerva Merrick admitted and believed said information to be true; that, beginning with-

in a few days after he, the said Orchardson, so first came to Quincy, he made the acquaintance of said Minerva Merrick, and from that time until the alleged marriage spent much of his time at her house; that he had with him, and said Minerva Merrick read, a number of what he falsely and fraudulently alleged to be the writings from the spirits of persons distinguished in history and long since dead, which writings he falsely and fraudulently professed to have seen written in a miraculous manner without human hands; that in these supposed communications the said Orchardson professed to be directly addressed by the spirits as "The Son of Wisdom" and by other laudatory titles; that they purported to speak at considerable length in exalted terms of the powers of the person addressed, defining them as like unto those of Jesus Christ, referring to said Orchardson as destined to be the savior of the human race and as commissioned by the spirits to reform and regenerate mankind; that they also indicated that these communications, and other phenomena supposed to be in the possession of the said Orchardson of like character, should be prepared and published as a book, the sales of which should net a very large sum of money; that some of them referred to the want of means on the part of said Orchardson to carry out the supposed commission, and intimated that this want should be supplied and that he should persevere; that said Orchardson also referred in credulous terms to his confidence <sup>22</sup> in the statement that he had been on the planet some centuries prior to his present nativity, to the fact that many most important communications from the spirit world had come to him directly without the intervention of any other medium, and under conditions which he stated as, from his personal knowledge, they could not possibly be untrue or unreal; that within a few days after the said Orchardson commenced to visit at said Mrs. Merrick's house he commenced to write the said book, and wrote the same at her house, spending most of his time there, and finished the book, and had it printed and issued from the bindery, at Mrs. Merrick's expense, a few days before the alleged marriage, the book being entitled, "The Light of the Ages, and Death Blow to Poverty"; that it was by dedication addressed to Mrs. Merrick, contained numerous flattering references to her, represented that his opinion and hers on the subject treated were in accord; also represented that Mrs. Merrick had become the financial support of the book, and of Orchardson in carrying out the commission referred to in the spirit writing; that a considerable part of the book was occupied with

a reproduction of the said supposed spirit communications, and a recital of extravagant spirit phenomena supposed to have come within said Orchardson's personal observation and experience; that the said Minerva Merrick was informed of the contents of said book and the matters above referred to, and by reason of her said weakness and delusion of mind and monomania, and the false and fraudulent representations of said Charles Orchardson, believed the same implicitly to be true, and believed the said Orchardson to possess the attributes and to be charged with the commissions referred to in the alleged spirit writings, and that in so believing she refused to consider the advice and caution of her formerly trusted friends and counsel or to be influenced by her own mind and will, and was in that respect controlled wholly by her said weakness and insane delusions of mind, and was not possessed of sufficient mental capacity to<sup>23</sup> free her mind from that belief and delusion; that the said pretenses and representations by the said Charles Orchardson were made by him falsely, and with a design and purpose by fraud and falsehood to obtain the confidence of the said Minerva Merrick, to obtain control of her person and bring about the alleged marriage, and with a fraudulent scheme and purpose of obtaining her property; that a short time prior to the time when said alleged marriage occurred, the said Charles Orchardson, together with one William H. Boyer, who also claimed to be a spirit medium, knowing of the aforesaid weakness and insane delusion of mind of said Minerva Merrick, and by further fraud, artifice and deceit, and in furtherance of said scheme and the design of said Charles Orchardson, and with intent to defraud and entrap the said Minerva Merrick into the relation and state of marriage with the said Charles Orchardson, falsely and fraudulently caused the said Minerva Merrick to believe, through the medium of the said William H. Boyer, that he, the said Boyer, was in communication with the spirit of her said deceased husband, Dr. Marcus Merrick, and that it was the will and direction of her said deceased husband, who was represented to be then and there present and addressing her, that she should marry said Charles Orchardson; that the said Minerva Merrick, then insanely believing such communications and directions to come from her said deceased husband, and that he was then so present as represented, and that it was her duty to obey his said supposed directions, and then laboring under her aforesaid weakness and insane delusion of mind, and without the intervention and exercise of her own mind and will, and without



having sufficient mental capacity to disenthral herself from said belief and delusion, and by means aforesaid and not otherwise, shortly thereafter was procured by the said Charles Orchardson, and through his said falsehood and fraud, to submit with him to a ceremony of marriage, and did submit to such form and ceremony of marriage; that the said alleged <sup>24</sup> marriage ceremony was procured and brought about wholly by the fraud, artifice, imposition, and deceit of the said Charles Orchardson, acting in person and through others, practiced upon her while she was in the condition of mind aforesaid; that the said Minerva Merrick, at the time of said marriage, was, and from the time of said marriage down to her death remained, enthralled, dominated, and controlled by the said weakness and insane delusions on her part and by her belief in said pretended spiritualistic communications, directions, and representations, and by the fraud of the said Charles Orchardson, and by her said belief and insane delusions that it was and continued the wish and direction of her said deceased husband that she should become and remain the wife of the said Charles Orchardson, and that it was her duty so to do; that there was no time, at or after said marriage, when she was released from said insane delusions and weakness of mind, or was able to exercise her own mind, will, or judgment in regard to said marriage, or knew or realized in her own mind the fraud so practiced upon her, or when she was possessed of the mental capacity to ratify or consent to said alleged marriage, or to consider, in and by the exercise of her own mind and will, the situation in which she had been placed or which she occupied by reason of the said pretended marriage and the aforesaid fraudulent representations and conduct of the said Charles Orchardson; that said alleged marriage was never consummated by coition between the parties thereto as husband and wife, and that it was never consented to or ratified by the free will and consent of the said Minerva Merrick; that no issue was born of said alleged marriage; that said Minerva Merrick did not, at the time of said marriage or thereafter, discover said fraud so practiced upon her by said Orchardson or said Boyer, and did not, at any time after said marriage, possess sufficient mental capacity to either ratify or disaffirm said marriage or to assume the relation of wife to said Charles Orchardson.

<sup>25</sup> Concerning the mental condition of the said Minerva Merrick, the court found, from the evidence, that for a number of years last preceding her said alleged marriage to Charles Orchard-

son she had, in numerous instances, invested large sums of money unprofitably, wastefully, and irrationally, wholly at the dictation of what she supposed to be disembodied spirits, deeming it to be her duty to do so, and without the exercise of her own mind and will in so doing; that she had also, at times, under the advice of the so-called spirits, been greatly suspicious and troubled concerning her business matters where no ground of suspicion existed, and where to a rational mind the security of her business, in the matters about which she was so suspicious, would have been readily perceived, and in such matters she was incapable of receiving rational advice and acting thereon, and her suspicion could only be allayed by following the course mapped out by the spirits, and then at a wholly unnecessary cost and waste of her property, to which cost and waste she readily yielded, and without sufficient mind to realize the imposition to which she had been subjected; that she had, during all her life, been a woman of chaste and pure thought and morals, but, owing to the domination and influence of her said mental delusions and her infatuation therewith, she had, at the time of said alleged marriage, become an apologist for the debauchery of others and insensible to the immoral contamination surrounding her, and from that time to her death she so acted as to belie the purity and womanhood of her former life; that during the many years of her widowhood, and down to a very short time preceding the said alleged marriage, she often expressed her aversion to a second marriage, and had steadily adhered thereto until the pretended message from her departed husband came, as she believed, when, under the irresistible influences of her insane delusions, and particularly under the belief and delusion that her husband had so directed and that it was her duty to obey <sup>26</sup> such directions and to disregard her own inclination, will and judgment, and under the delusion that alleged spirits had commissioned the said Charles Orchardson as aforesaid, and that he was possessed of the powers and functions aforesaid by and through such spirits, and that she was assisting him therein, she was taken possession of, dominated, and controlled by said delusions and beliefs, and wholly unable to exercise her own judgment, and took part in and became party to said alleged marriage, and in doing so believed and felt, concerning said Charles Orchardson, that she had found one who espoused the doctrines so near to her heart, and who would revolutionize the world and eliminate the misery and sorrows from the conditions of men; that said Minerva Merrick was at the time of the said

alleged marriage, and from that time continuously down to the time of her death remained, insane upon the subject of spiritualism, and that insane delusions arising from her monomania were, and continued during all that time, officious, operative, controlling, and influential in producing an insane consent to the said alleged marriage, and that but for such insane delusions she would never have married the defendant, Orchardson, or have continued thereafter during her life to be known as his wife, and that by reason of such insane delusions she was not, at or at any time after the said marriage, of sufficiently sound mind to consent to become or be the wife of the said Charles Orchardson, and that the alleged marriage of Minerva Merrick and said Charles Orchardson was, and remained until the death of the said Minerva Merrick, null and void.

The will was executed February 3, 1894, about ten months after the marriage. It gives to the defendant George H. Turner three thousand dollars, and to Minerva Merrick Sales, a grand-niece, another of the defendants, two thousand dollars. All the remainder of her estate, real and personal, she willed to Charles Orchardson, and appointed him executor of the will without bond. She died June 11, 1894.

<sup>27</sup> The contention that the special verdicts of the jury on the issues submitted to it should be held conclusive as to the validity of the will could only be sustained upon the ground that they are so inconsistent with the general verdict that the latter cannot stand. The testatrix may have "possessed sufficient mental capacity to transact ordinary business" and at the time she signed the will "had sufficient mental capacity to know and understand the business in which she was engaged," and still, under the issues in this case, have been wholly incapable of making a will. Complainants do not allege in their bill, nor is it the theory of their case, that she was insane or of unsound mind generally, but that she was the victim of an insane delusion, under which she labored at the time she made the will. Capacity to transact ordinary business, and to know and understand the business in which one is engaged at the time of making a will, are evidence of testamentary capacity, unless the testator was at that time affected with some morbid delusion which influenced his action: *American Bible Soc. v. Price*, 115 Ill. 623, and authorities there cited. The question here is, Was her natural "mental capacity" exercised in the making of her will, or was she at the time influenced and controlled by the alleged insane delusion? The special findings of the jury were not, therefore,



irreconcilable with the general verdict. The question on this branch of the case then is, Does the evidence sustain the general verdict of the jury? and 1. Was the testatrix the victim of an insane delusion to the extent of destroying her testamentary capacity when influenced or controlled by that delusion? and 2. Was she so influenced in making this will?

We said in *American Bible Soc. v. Price*, 115 Ill. 638: "Beyond all question it is within the previous rulings of this court, and abundantly sustained by the rulings of other courts of the highest respectability, that where there is insane delusion in regard to one who is an object of the testator's bounty, which causes him to make a will <sup>28</sup> which he would not have made but for that delusion, such will cannot be sustained. And so also where there is insane delusion in regard to the duty or moral obligation of a party to make a will in favor of a particular individual, corporation or society, and a will is made as the result of that insane delusion, it cannot be sustained: 1 Redfield on Wills, 3d ed., 72, 74, et seq. and notes; 1 Jarman on Wills, 5th ed., 38, et seq. and notes; Buswell on Insanity, secs. 13, 381."

The testimony in the record is so voluminous as to forbid an attempt to review it here. Much of it, on either side, is of very little or no relevancy to the issues in the case. Our examination of it, taken as a whole, has led us to the conclusion that it sustains, in substance, the findings of the chancellor as recited in the decree. It thus appears that Orchardson represented to Mrs. Merrick that he had, in certain communications from spirits, been addressed as "The Son of Wisdom," speaking of his powers as like unto those of Jesus Christ, and referring to him as destined to be the savior of the human race, and as commissioned by the spirits to reform and regenerate mankind; that it was indicated that these communications should be published in a book, the sales of which would yield large sums of money, etc.; that Orchardson shortly thereafter commenced to write such a book at her house, where he completed the same, and had it printed at her expense a few days before the marriage, and dedicated it to her; that the book contained numerous flattering references to her, representing that her opinions on the subject treated were in accord with those of Orchardson; that she had become the financial support of the book and of Orchardson in carrying out the commission referred to in the spirit writings, a considerable part of the book being occupied with a reproduction of the supposed spirit communications claimed to have been made to him; and the court found,

from the evidence, that she was informed of the contents of said book and the matters referred to, <sup>29</sup> "and by reason of her said weakness and delusion of mind and monomania, and the false and fraudulent representations of said Charles Orchardson, believed the same implicitly to be true, and believed the said Charles Orchardson to possess the attributes and to be charged with the commission referred to in the alleged spirit writings."

From these recitals of facts, as well as from a careful reading of the testimony, we are forced to the conclusion that from a time prior to the marriage to the making of the will, and until her death, Mrs. Merrick was the victim of a morbid and insane delusion as to the character, powers and mission of Orchardson, believing him to be possessed with superhuman attributes and powers and charged with a commission beyond that committed to ordinary men, and that in making him the principal recipient of her bounty she was influenced by that delusion. There is not in this voluminous record a particle of proof that she entertained for him the remotest sentiment of affection, gratitude, or admiration, except as she was controlled by the delusion that he was more than a mere man, and that he was under the influence of spirits commissioned to do and perform superhuman acts. He was in no rational sense the object of her bounty, nor can we believe from this evidence that she was influenced to so treat him except through the delusion referred to. The gift to him was not prompted by a desire or sense of duty to provide for him as man, but because she had been, by reason of her diseased mind and through the influence and desire of Orchardson, made to believe that he was more than a man—gifted with superhuman faculties. She believed it her duty to bestow her property upon him because of her morbid, insane delusion as to him, and we repeat, as said in *American Bible Soc. v. Price*, 115 Ill. 623, it appearing that such insane delusion in regard to her duty or obligation to make the will in his favor was the result of that insane delusion, the will cannot be sustained. On this ground the general verdict was warranted by the testimony.

<sup>30</sup> In reaching this conclusion we do not hold that a mere belief in spiritualism is proof of insanity. A charge of general insanity is not supported by proof of mere belief on questions of opinion, however absurd; but when, as here shown, an act was done under the promptings of an insane delusion, and the proof shows that it was the result of belief in facts the existence of which no rational person would believe, insanity is proved. Belief in spiritualism is not proof of insanity, but if, through that

belief, one is led into the delusion that another is a god—a Christ—or gifted with powers and faculties belonging only to supernatural persons, the believer of the delusion is insane on that subject, and if he is prompted to make a will by that delusion his will cannot be sustained.

Counsel for appellant cite and reply upon *Whipple v. Eddy*, 161 Ill. 114, as an authority sustaining the validity of this will. The contestant in that case was the adopted daughter and sole legatee of the intestate. She sought to have the will set aside so that she might come into immediate possession of the estate, instead of being prevented from doing so until she reached a certain age, as provided by the will. There was nothing in the bill or proof in that case to the effect that the testator was influenced, in making his will, by a belief in spiritualism or any other delusion. The charge was that he was insane, and it was shown he had been a believer in spiritualism and had been influenced by that belief to do many irrational things, but there was an absolute absence of testimony to the effect, or even tending in the slightest degree to show, that he was prompted to make his will by his belief in spiritualism. What we there said as to the effect of belief in spiritual influences, etc., was thought to be applicable to the issues and facts of that case, but the statement in the opinion, "the record is barren of proof even tending to show that the subject of spiritualism ever entered his mind in connection with his will," sufficiently distinguishes that case from this.

<sup>31</sup> We also think the verdict of the jury is abundantly sustained on the ground of undue influence. The third special interrogatory propounded to the jury was answered in the affirmative—that is, that there was undue influence exercised over the testatrix connected with or operating upon her at the time she executed the will. That appellant sought out Mrs. Merrick at her home in Quincy and took advantage of her extreme views on the subject of spiritualism with the design and for the purpose of obtaining her property is morally certain. That he obtained complete mastery over her will is equally certain. He procured the will to be written, and while it is claimed he acted under her directions, we are satisfied that the directions were of his own procurement. There is every reason for believing, from the evidence, that he brought about its execution in privacy himself, selecting and procuring the attendance of witnesses in whom he could confide. He it was who prompted her, when the witnesses and parties selected to be present had assembled



in her room, to declare that the paper was her will. While there was no little skill and ingenuity displayed by him in concealing the fact, we cannot doubt that he was the real, active, moving agency in having the will executed, and that she was induced to make it through his influence and procurement. Certainly there was sufficient evidence of that fact to justify the special finding of the jury that there was undue influence. We do not overlook the fact that it is not every influence exercised over a testator or testatrix by the beneficiary under a will which will justify a decree setting it aside; but when the relative positions of these parties are considered, she being an aged and feeble woman, laboring under the influences of an insane delusion brought upon her through his machinations, the rule can have no proper application.

The verdict of the jury that the alleged will was not the last will and testament of the testatrix was, we think, fully authorized by the testimony on both grounds alleged. <sup>32</sup> On the issue as to whether the marriage between Mrs. Merrick and Charles Orchardson was void because of her want of mental capacity to enter into the marital relation, we think the court below decided correctly. Section 2 of chapter 89 of our statutes provides: "No insane person or idiot shall be capable of contracting marriage." Clause 6, section 1, chapter 131, says: "The words 'insane person' and 'lunatic' shall include every idiot, non compos, lunatic, insane, or distracted person." These provisions are but declaratory of the common law: 1 Bishop on Marriage and Divorce, par. 136; 1 Kent's Commentaries, 76; Jenkins v. Jenkins, 2 Dana, 102; 26 Am. Dec. 437; Crump v. Morgan, 3 Ired. Eq. 91; 40 Am. Dec. 447. In the latter case it was said: "We have no doubt that by the common law of England, as far as can be traced for four or five centuries, a marriage of a lunatic is void, and must be pronounced so by every court to each and every form in which the subject can be presented." And we said in Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep 105: "A void marriage is good for no legal purpose, and its invalidity may be shown in any court, between any parties, either in the lifetime of the parties thereto or after their death." Also: "A simple marriage ceremony will not make a man and woman husband and wife. Capacity and consent are absolutely essential, but celebration only contingently so."

It is clear, from all the evidence, that the mental condition of Mrs. Merrick did not materially change after the marriage—certainly not for the better—and, therefore, if void when entered into, the marriage continued so to her death, and her heirs

may have it annulled. The controlling question, therefore, now is, Was she mentally capable of entering into the marriage relation on April 12, 1893, the date of the marriage?

It is impossible to prescribe a definite rule by which the mental condition as to sanity or insanity can in every case be tested. That laid down by Mr. Bishop in his work on Marriage, Divorce, and Separation, volume 1, section 600, is generally approved. After referring to the decisions of <sup>33</sup> different courts on the subject he says, section 599: "Marriage is the legal band around affections assumed to be already united and the blending of two lives in one, and while it is in some degree of the head, it is primarily and chiefly of the heart. Hence, in reason, the test question should be, whether or not the parties have the capacity of mind required for duly comprehending this union." He then states in the following section (600) the "true doctrine," as follows: "Assuming this to be the correct idea of the subject matter of the contract, none of the foregoing enunciations from the bench are precisely accurate, but the true view, in principle, is as follows: The mental incapacity which disqualifies one for crime is such as renders it impossible he should entertain the criminal intent. The disqualifying incapacity for making a deed, a will or a bill of sale of personal property is such as puts it out of the power of the person to exercise a disposing mind in respect of the particular thing." The question here is not altogether of brain quantity or of brain quality in the abstract, but it is whether or not the mind could and did act rationally regarding the precise thing in contemplation—marriage. In a marriage case the question is whether the alleged insane person acted rationally regarding marriage, and the particular marriage in dispute; not, indeed, whether his conduct was wise, but whether it proceeded from a mind sane as respects the thing done, etc.

It would be hard to conceive of a more irrational act than that of Mrs. Merrick in becoming the wife of Charles Orchardson. She had reached an extreme old age; was afflicted with an incurable disease; was possessed of a comfortable home, and an abundance of money and property with which to satisfy her every want and taste. She had many attentive and devoted friends and neighbors, with whom she had been associated for years. Her tastes were refined and her moral sense unperverted, disapproving of immorality, intemperance, and other like sins. She held in the highest esteem the memory of her <sup>34</sup> husband, who had been a man of superior character and intelligence. The un-

contradicted evidence produced upon the trial before the jury, and upon which the decree of the chancellor voiding the marriage was based, shows that as to each of these ennobling characteristics and virtues in Mrs. Merrick, Charles Orchardson was as completely her antithesis as it is possible for one person to be unlike another. Especially must his debaucheries and associations with lewd women have shocked her sense of virtue and morality, and repelled her from coming in contact with him, had she been in the exercise of her normal faculties. It is true that many strange and unnatural marriages are contracted and the sanity of the parties not questioned; but it is also true that when the question is raised it not infrequently appears that some insane delusion prompted one or the other of the parties in contracting such unnatural marriages. Certainly, in so extreme a case as this the mind naturally attributes the act to some unusual motive or influence, and we think it is found here both in Mrs. Merrick's belief in the superhuman powers and attributes of Orchardson, and the insane delusion that the spirit of her dead husband dictated and approved of the marriage. All the evidence shows that she never conceived the idea of assuming the relation and the duty of a wife by the marriage as ordinarily understood. Whether she should marry the man or adopt him as her son was a matter of indifference, her sole object and purpose being to place herself and her property in such relation to him that they might be used by him, through his extraordinary powers, in the accomplishment of his wonderful mission.

Counsel for appellant reiterate the proposition that the fact that a person believes in spiritualism, ghosts, dreams, etc., is not proof of his or her insanity, and cases are cited holding where general insanity is charged, and without proof that the belief led the believer into some insane delusion which prompted the act sought to be set <sup>35</sup> aside, the act was valid, however extreme or unreasonable the belief in spiritualism or other like beliefs. We have no criticisms to make upon those authorities. They are not in conflict with that other class of cases which hold that if a person labors under a mental delusion on a subject at the time of making a will or entering into a contract, and the will or agreement is the result of such delusion, then the will or contract is void, notwithstanding the person may have been sane on all other subjects. In *American Bible Soc. v. Price*, 115 Ill. 632, the circuit court instructed the jury: "If the jury believe, from the evidence, that although Isaac Foreman had sufficient capacity to attend to the ordinary business affairs



of life, yet that with regard to subjects connected with the testamentary disposition and distribution of his property and the natural objects of his bounty he was insane, and that while laboring under such insanity he made the will in question, and that in making it he was so far influenced or controlled by such insanity as to be unable rationally to comprehend the nature and effect of the provisions of the will, and was thereby led to make the will as he did, then the jury must find the will not to be the will of the said Isaac Foreman. An insane delusion is a fixed and settled belief in facts not existing, which no rational person would believe. Such delusion may sometimes exist as to one or more subjects, and if the jury believe, from the evidence in this case, that Isaac Foreman was laboring under such insane delusions upon subjects connected with the testamentary disposition of his property and the natural objects of his bounty when he made the will in question, and was thereby rendered incompetent to comprehend rationally the nature and effect of the act, and that but for such delusions he would not have made the will as he did, then the jury should find against the validity of the will." And it was insisted, upon appeal to this court, that the giving of that instruction was error; but we held otherwise, and sustained the <sup>36</sup> ruling of the court below upon the ground that it announced the correct rule of law. It was also held in that case that the belief of the testator, Foreman, that by placing his property in religious institutions for charitable purposes it would continue to increase until the day of judgment—to work for him—was evidence of a morbid delusion sufficient to sustain the verdict of the jury holding his will to be invalid. It cannot be said that the law is different as to marriage or other contracts.

Judge Bonney, who heard the case below, in his able and elaborate written opinion filed with his decision on this branch of the case, after summing up the evidence tending to show that Mrs. Merrick was the victim of an insane delusion growing out of and resulting from her belief in spiritualism, said: "Numerous witnesses who knew her well, who were her immediate neighbors and who saw her frequently, declare her insane upon the subject of spiritualism; and to four physicians were put hypothetical questions, every element of which was abundantly proven by the testimony in the case, who gave the opinion, as experts, that she was insane. She built Merrick Hall at a place which rendered the construction of the building unusually expensive, because she was under the delusion that

the spirit of her dead husband directed her to build it, and to build it at that particular place. She sent to Washington and brought hither an attorney to collect a claim against an estate perfectly solvent, and paid him the sum of five hundred dollars therefor, because she had been advised by the spirits, and was under the insane delusion that she was about to lose her money, or some of it, and it must be the Buckley money, and this, too, when she had an attorney here who had attended to her business affairs for several years, and whom she had known much longer, and against whose honesty and integrity the finger of suspicion had never turned. So strong was the delusion, that she offered him five hundred dollars, to collect the same moneys, and when he assured her that the claim was safe and refused <sup>37</sup> her exorbitant offering, instead of listening to his advice and the voice of reason she blindly followed the behests of her delusion, in the manner so characteristic with persons afflicted with this form of insanity, and brought the Washington lawyer to her aid. The surrender of the mortgage to Clara Robinson, her dealings with Hainer, both of whom were mediums, evince her deranged condition whenever the circumstances offered an opportunity for her belief in spiritualism to become influential. Though highly moral, and absolutely pure in every thought and deed that sprang from her long life, through the influence of spiritualism she became an apologist for the debauchery of others and so acted as to belie every element of her purity and womanhood. A radical change takes place in the very essentials of her character. She had frequently expressed her aversion to a second marriage, and steadfastly adhered to her resolution until the pretended message from her husband came, and then, under the irresistible influence of her insane delusion, she assented, believing she had found one who espoused the doctrines so near to her heart, and who could revolutionize the world, eliminate misery and sorrow from the conditions of men, and, as it were, make earth a paradise."

It is also to be kept in mind that, in the view we have already expressed, the marriage in question was brought about and procured by Charles Orchardson in the accomplishment of his scheme and purpose to obtain possession of the property of Mrs. Merrick, and this fraud is to be taken into consideration in connection with the evidence of the mental incapacity of Mrs. Merrick at the time of the alleged marriage. Bishop, in his work on Marriage, Divorce, and Separation, volume 1, section 611, says: "The intellect may be very weak, not absolutely free

from derangement, while yet not to an extent disqualifying the person to contract matrimony, for the disorder or feebleness, to have this effect, must have reached a standard magnitude." And he adds, in section 612: "The cases <sup>38</sup> oftenest occurring are where partial insanity or great weakness of intellect is circumvented by fraud. Such a case was the Earl of Portsmouth's, who, being of weak and somewhat disordered mind, was led by the artifice of his trustee and solicitor, whose influence over him was great, into a marriage with the latter's own daughter. The marriage was declared void. And in another case of the like nature, a man of forty contrived to bring about between himself and a woman of seventy, a drunkard, with considerable property, which he sought to secure, a marriage without a settlement, or the knowledge of her friends. It also was adjudged void." And again, in section 613: "The two ingredients of fraud and insanity, thus blending, often in matrimonial causes produce by their united action a nullity which neither could alone effect." *Lyndon v. Lyndon*, 69 Ill. 43, is in harmony with this principle.

In the case of the man of forty intermarrying with a woman of seventy referred to above, which is the case of *Browning v. Reane*, 2 Phillim. 69, the evidence was to the effect that the woman was not only addicted to the excessive use of intoxicating liquors, but that she had been from childhood of very weak intellect. But the court does attach importance to the fact that the evidence disclosed that the marriage was procured by the man for the purpose of obtaining the estate of the woman, and in speaking of the weight to be given to the alleged fact of marriage it is said: From "merely pleading the fact of marriage the court could not expect much that was satisfactory. If the marriage was brought about by fraudulent confederacy there would be two descriptions of persons present at it—the parties confederating, and those whose presence was necessary and who might be deceived and imposed upon." This language, we think, is peculiarly applicable to the facts in this case as to the manner in which the empty ceremony of marriage was pretended to be celebrated.

<sup>39</sup> In *Foster v. Means*, 1 Spear Eq. 569, 42 Am. Dec. 332, a marriage was held to be null and void between a man and woman on the ground of the mental incapacity of the man and the fraudulent procurement of the woman. In that case, as in *Browning v. Reane*, 2 Phillim. 69, the mental defect was from childhood, and while there was some evidence to the effect that



the man was capable of reasoning to a limited extent and comprehending some of the ordinary matters of life, the judgment avoiding the marriage was based upon the mental weakness, together with the undue influence exercised by the woman in the procurement of the marriage. In rendering the opinion, the court says, after speaking of the mental infirmity: "I have no doubt but that the complainant availed herself of this imbecility of mind and the natural instincts which might prompt him to marry, either to induce him to propose marriage or to propose it herself, with the expectation of securing his property to herself. There could have been no other motive on her part to enter into such a contract with such a man." So, here, it appears beyond cavil that Charles Orchardson entertained for this deluded old lady no single sentiment of affection or esteem, which must prompt every honorable marriage, and that he married for her money, and nothing else. "There could have been no other motive on his part to enter into such a contract with such a woman." Still less could Mrs. Merrick have entered into such a contract with such a man had not her reason been dethroned. No one will suffer by the decree below unless it be the wrongdoer himself. No right or interest of society demands that such a marriage should be upheld.

We think the chancellor rendered his decree in accordance with the law and the evidence upon both branches of the case, and it will accordingly be affirmed.

Decree affirmed.

Carter, J., took no part.

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**WILLS—INSANE DELUSION—SPIRITUALISM.**—A will is invalidated by an insane delusion, when it is the result of the delusion, but not otherwise: *Notes to Haines v. Hayden*, 35 Am. St. Rep. 579; *In re Cline's Will*, 41 Am. St. Rep. 854; *Thomas v. Carter*, 170 Pa. St. 272; 50 Am. St. Rep. 770. Belief in spiritualism does not of itself show insanity, unless it amounts to a monomania: *Connor v. Stanley*, 72 Cal. 556; 1 Am. St. Rep. 84, and note. A man may be of sound mind in regard to his dealings in general while he is under an insane delusion, and whenever it appears that his will was the direct offspring of his partial insanity or monomania, which was the cause of the disposition made by him of his property, and that without it such disposition would not have been made, it should be disregarded: *Thomas v. Carter*, 170 Pa. St. 272; 50 Am. St. Rep. 770. For monographic note on insane delusions see note to *People v. Hubert*, 119 Cal. 216, ante, p. 80.

**MARRIAGE—CAPACITY AND CONSENT—CEREMONY—INSANE PERSONS.**—The essentials of a valid marriage are capacity and consent: *Voorhees v. Voorhees*, 46 N. J. Eq. 411; 19 Am. St. Rep. 404; without them, a ceremony is of no consequence: *Roszel v. Roszel*, 73 Mich. 133; 16 Am. St. Rep. 569. The marriage of an insane person is void, for want of mental capacity to contract: Note to

State v. Setzer, 2 Am. St. Rep. 293; Harrison v. State, 22 Md. 468; 85 Am. Dec. 658. A void marriage is good for no legal purpose, and its invalidity may be proved at any time, in any court, and by any person: Cartwright v. McGown, 121 Ill. 388; 2 Am. St. Rep. 105. This rule applies to the marriage of an insane person: Note to State v. Setzer, 2 Am. St. Rep. 293. If a person, non compos, has been induced by another to marry only for the purpose of securing his property, the marriage is void: Foster v. Means, 1 Spear Eq. 569; 42 Am. Dec. 332.

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## BIGELOW v. CADY.

[171 ILLINOIS, 229.]

**POWERS—EXERCISE OF, BY AN ADMINISTRATOR SUCCEEDING AN EXECUTRIX WHO RESIGNS.**—If an executrix resigns, she no longer has a right to exercise a discretionary power, conferred by the will, to sell land, and the appointment of an administrator, with the will annexed, does not confer upon him the right to exercise the power to sell that which was given by the provisions of the will to the executrix named therein.

**DEFINITIONS.—PERPETUITY** is a limitation, in an instrument, taking the subject matter of the perpetuity out of commerce for a period of time greater than a life or lives in being and twenty-one years thereafter.

**DEVISE—WHEN VOID AS CREATING A PERPETUITY.**—A devise is void if there is a possibility that a violation of the rule against perpetuities can happen, whether it creates a legal or a trust estate.

**DEVISE—WHEN VOID AS CREATING A PERPETUITY.**—A devise in trust, providing how the proceeds of any lands sold shall be disposed of, but which makes no provision for the vesting of the fee in any one, at any time, and which does not fix any time when such proceeds shall be paid to any one, is void, as creating a perpetuity.

**DEVISE—CLAUSE SHOWING AN INTENT TO CREATE A PERPETUITY.**—An intent to create a perpetuity is manifested by a clause of a devise in trust, which provides for the appointment of trustees "for all time to come."

Bill for partition, brought by the appellant, Hiram Bigelow, administrator, against Anna Cady and others.

N. F. Anderson, for the appellant.

John P. Hand, for the appellees.

**230 PHILLIPS, C. J.** This was a bill for partition, filed in the Henry county circuit court. The bill alleges that Richard Mascall died on September 18, 1888, leaving a last will and testament, which was duly admitted to probate in the county court of Henry county, Illinois (a copy of which is made part of the bill), and that he left surviving him his widow, Mary J. Mascall, and three children as his heirs at law, who are appellees herein. The bill also alleges that the debts and legacies have been paid,

and that the appellees are the owners in fee of the lands sought to be partitioned, comprising several hundred acres and numerous town lots. To the bill a demurrer was interposed, which being overruled the administrator excepted thereto and prosecutes this appeal.

The controversy in this case arises upon the construction of certain paragraphs of the will, and whether a perpetuity is created. The contention of the appellees is that a perpetuity was created, and therefore, as to the lands included within the clause of the will which created a perpetuity, such lands and town lots became intestate property.

The eighth paragraph of the will is as follows:

"Eighth.—It is my will and desire that all the land and town lots that I may own at my death (that I have not otherwise bequeathed), in Illinois, Minnesota, or Nebraska, or any other real estate wherever it may be, if there be any, it shall be taken charge of by the executrix or executor, as the case may be, shall either rent or sell the property, leaving that to the judgment of the executrix or executor. In either case, after paying taxes, and other repairs, and reasonable compensation for so doing, then the balance, if there be any, if rented and collected, then each year shall be equally divided as follows: one-fourth to my daughter Anna Cady, one-fourth to my daughter Martha M. Bristol, one-fourth to my son, James P. Mascall, <sup>231</sup> and one-fourth to my wife, Mary J. Mascall. If any lands or lots should be sold, the money is to be put to interest as soon as it can be done conveniently. It is left to the judgment of the executrix or executor. When the interest is collected it shall be equally divided between my four heirs above mentioned in this paragraph, after paying all taxes, and reasonable compensation for so doing. In case of death of either of the four above named heirs it shall go (their share) to the heirs of the deceased heir, if they have any; if not, it shall be equally divided between my remaining heirs above mentioned, and their heirs forever, share and share alike. If my wife, Mary J. Mascall, dies leaving no heir of mine, then her share (one-fourth) shall go to my heirs and their heirs forever, share and share alike."

By the twenty-ninth clause of the will it is provided:

"Twenty-ninth.—I hereby make, appoint, and constitute my said wife, Mary J. Mascall, executrix of this my last will and testament, without bonds. At the death, or in case of disability, of the said Mary J. Mascall, in either case the judge of the probate court of Henry county, Illinois, shall appoint some good,



suitable person to succeed her as executor. In case of death or inability of said executor the judge shall, from time to time and for all time to come, appoint a good, suitable person as a successor. In every appointment they shall give sufficient bonds to satisfy the judge of said probate court. I hereby make, publish, and declare this, and none other, to be my last will and testament, consisting of twenty-two (22) pages. In testimony whereof I have hereunto set my hand and seal this twenty-sixth (26th) day of January, 1887."

Mary J. Mascall qualified as executrix under this will and acted for a time, and then resigned and elected to take under the law, when appellant was appointed administrator with the will annexed. By the eighth clause of the will the right to sell or lease the land in controversy is provided for, leaving it to the judgment of the <sup>232</sup> executrix named in the will as to whether it should be leased or sold. She resigning, no longer had a right to exercise the power of sale conferred by that clause, and the appointment of an administrator with the will annexed did not confer upon him the right to exercise the power to sell that was given by the provisions of that section to the executrix named in the will: *Hall v. Irwin*, 2 Gilm. 176; *Nicoll v. Scott*, 99 Ill. 529.

No provision is made for the vesting of these lands in anyone. They are simply to be taken charge of by the executrix appointed under the will. No provision is made for the fee to vest in, or possession to come to, the heirs or any of the descendants at any time. Neither is there provision made that at a time in the future the proceeds of the lands, if converted into money, should be paid over to the heirs or their descendants. Hence this provision is one in which lands owned by the testator are to stand in perpetuity, to be rented by the executor or administrator of the testator. The intention of the testator is disclosed by the provision of the twenty-ninth clause of the will, that "in case of death or inability of said executor the judge shall, from time to time and for all time to come, appoint a good, suitable person as a successor." This is a declaration of an intention to create a perpetuity as to this land, on the part of the testator. Because of the resignation of the executrix named and the appointment of the administrator with the will annexed, the lots and lands included in the eighth clause are held by the administrator to be rented, and to collect the rents and divide the same, with no power in him to sell the lands without a decree of court. The debts having been paid, no right to sell

would be conferred on him and no power to sell could be exercised by him.

Perpetuity is a limitation taking the subject matter of the perpetuity out of commerce for a period of time greater than a life or lives in being and twenty-one years thereafter. If, by any possibility, a devise violates the <sup>233</sup> rule against perpetuities it cannot stand. If there is a possibility that a violation of this rule can happen, then the devise must be held void: *Waldo v. Cummings*, 45 Ill. 421; *Post v. Rohrbach*, 142 Ill. 600; *Deford v. Deford*, 36 Md. 176; *Sears v. Putnam*, 102 Mass. 6; *Gray on Perpetuities*, secs. 214, 369, 374. Neither will the violation of the rule against perpetuities be tolerated when the property is covered by a trust, any more than when such violation actually appears in the creation of a legal estate. Courts of equity will not permit limitations of future equitable interests to transcend those of legal interests, which are upheld as executory devises and shifting and springing uses at law: *Howe v. Hodge*, 152 Ill. 252.

If it could be contended that by the eighth clause of this will the rents of the lands are devised to the persons named therein, and their heirs, absolutely, they to take the entire income, that would pass the land itself, for a devise of rents and profits, or the income of land, both at law and in equity, is a devise of the land. This rule is based upon the feudal law, under which the beneficial interest in the land consisted of the right to take rents and profits. It cannot be held that the rents and profits vested in the persons named in the eighth clause, and their heirs, forever, because the right of the heirs of Mary J. Mascall to take was dependent on her leaving children, heirs of the testator.

By the sixteenth clause of the will the dividend of ten shares of bank stock, or the interest derived from the proceeds, was to be forever used in caring for the family cemetery lot, and it is urged the provision of the twenty-ninth clause applies and has reference to the sixteenth clause, and not to the eighth. Inasmuch as the eighth clause does not provide for the vesting of the fee of the land at any time, or for the payment of the proceeds to anyone at any time if the land should be sold, this latter contention cannot be sustained. The intention of the testator being disclosed by the provisions of the will, and <sup>234</sup> no time fixed for the lands or the proceeds derived from the sale of the same, included in the eighth clause of the will, to vest in any one, the rule against perpetuities is violated, and the lands included in

that eighth clause became intestate, and were subject to partition by the legal heirs, and the demurrer to the bill was properly overruled.

The decree of the circuit court of Henry county is affirmed.  
Decree affirmed.

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**POWERS—PASSING TO OTHERS.**—Whenever a power is of a kind that indicates a personal confidence, it must *prima facie* be understood to be confined to the individual to whom it is given, and will not, except by express words, pass to others to whom, by legal transmission, the same character may happen to belong: *Gambell v. Trippe*, 75 Md. 252; 32 Am. St. Rep. 388.

**PERPETUITIES—DEFINITION.**—A perpetuity is any limitation or condition which may take away or suspend the absolute power of alienation for a period beyond the continuance of lives in being: *In re Walkerly*, 108 Cal. 627; 49 Am. St. Rep. 97, and monographic note thereto, on the rule against perpetuities.

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## MARKLEY v. PEOPLE.

[171 ILLINOIS, 260.]

**JUDGMENT—RES JUDICATA—FINALITY OF ADJUDICATION.**—A matter, whether consisting of one or many questions, which has been solemnly adjudicated by a court of competent jurisdiction, must, in any subsequent litigation between the same parties, where the same question or questions arise, be deemed to have been finally and conclusively settled, except where the litigation is a direct proceeding for the purpose of reversing or setting aside such adjudication.

**JUDGMENT—RES JUDICATA—FINALITY OF ADJUDICATION AS TO INVALIDITY OF ORDINANCE—SPECIAL ASSESSMENT.**—An order of court refusing a judgment for one installment of a special assessment is conclusive on an application for a judgment for a subsequent installment of the same assessment, on the same piece of property, where such judgment was refused because of the invalidity of the ordinance on which the assessment was based. There is no reason why the same material and essential fact, the validity of the ordinance, should be relitigated each time an installment of the invalid assessment falls due.

Rich & Stone and Randall W. Burns, for the appellant.

Charles S. Thornton, corporation counsel, and John A. May, for the appellee.

**262 WILKIN, J.** In the county court of Cook county the county collector made application for judgment on account of the delinquent fifth installment of a special assessment levied by the city of Chicago for the improvement of Prairie avenue. The appellant appeared and filed an objection, which sets forth that when application was made in the previous year to obtain



a tax judgment for the delinquent fourth installment of the same assessment, the county court refused judgment because of the invalidity of the ordinance in the special assessment proceeding. This former finding in favor of the appellant, it is claimed, is *res judicata*. To sustain his objection he offered in evidence the petition, assessment roll, judgment of confirmation, and the objections and all other papers and files belonging to the special assessment proceeding. He next offered the judgment of the county court refusing judgment on said former installment, and also the objections filed by him therein, and showed by a witness who was present at that trial that the court refused judgment on account of the invalidity of the ordinance. All of this evidence was admitted, but after hearing it the court found against the appellant.

This record presents the question of whether an order of the county court refusing judgment for one installment of a special assessment is conclusive on an application for a judgment for a subsequent installment of the same assessment on the same piece of property, where the finding of the court in the first proceeding was that the ordinance on which the assessment was based was invalid. In the light of a well-settled rule this question must be answered in the affirmative. "Where the former adjudication is relied upon as an absolute bar, there must be, as between the two actions, identity of parties, of subject matter and cause of action. There is, however, a clearly defined distinction between that class of cases and where some controlling fact or matter material to the determination <sup>263</sup> of both causes has been adjudicated in a former proceeding in a court of competent jurisdiction, and the same fact or matter is again at issue between the same parties. In this latter case the adjudication of the fact or matter in the first suit will, if properly presented, be conclusive of the same question in the latter suit, irrespective of whether the cause of action is the same in both suits or not. This is generally denominated estoppel by verdict": *Leopold v. Chicago*, 150 Ill. 568; *Wright v. Griffey*, 147 Ill. 496; 37 Am. St. Rep. 228; *Hanna v. Read*, 102 Ill. 596; 40 Am. Rep. 608.

Admitting that the subject matter in the two applications is not the same, in one case it being the fourth installment and in the other the fifth, still, they are both parts of one assessment and based on one judgment of confirmation. However this may be, it is clear, upon the authorities cited, the court having held, upon the application for judgment on a former installment, that

the ordinance on which the judgment of confirmation is based is void, it decided a material and essential fact to a recovery in this case. And as we said in *Hanna v. Read*, 102 Ill. 603, 40 Am. Rep. 608: "Whether the adjudication relied on as an estoppel goes to a single question or all the questions involved in the cause, the fundamental principle upon which it is allowed in either case is, that justice and public policy alike demand that a matter, whether consisting of one or many questions, which has been solemnly adjudicated by a court of competent jurisdiction, shall be deemed finally and conclusively settled in any subsequent litigation between the same parties where the same question or questions arise, except where the litigation is a direct proceeding for the purpose of reversing or setting aside such adjudication."

We see no reason why the same question should be relitigated each time an installment of an invalid special assessment falls due. The holding of the county court being to the contrary, its judgment must be reversed.

Reversed and remanded.

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JUDGMENT—RES JUDICATA—DOCTRINE OF.—A judgment is conclusive, if on a direct point, though the object of the two suits is different: *Gallaher v. Moundsville*, 34 W. Va. 730; 26 Am. St. Rep. 942; *Short v. Taylor*, 137 Mo. 517; 59 Am. St. Rep. 508; *Martin v. Evans*, 85 Md. 8; 60 Am. St. Rep. 292.

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## FISHBURN v. CITY OF CHICAGO.

[171 ILLINOIS, 338.]

CONTRACTS CREATING A MONOPOLY, OR PREVENTING COMPETITION—INVALIDITY OF.—All contracts in which the public are interested, and which tend to prevent competition required by statute, or some known rule of law, or which tend to create a monopoly, are void.

MUNICIPAL CORPORATIONS—ORDINANCES CREATING A MONOPOLY, OR PREVENTING COMPETITION—INVALIDITY OF.—An ordinance creating a monopoly, or preventing competition, is void. Thus, an ordinance making the use of an article or substance controlled by a single person or corporation indispensable in the construction of a public work, must necessarily create a monopoly in favor of such person or corporation, and also limit the persons bidding to those who may be able to make the most advantageous terms with the favored person or corporation.

MUNICIPAL CORPORATIONS—ORDINANCES CREATING A MONOPOLY, OR PREVENTING COMPETITION—INVALIDITY OF—PAVING STREETS.—If a contract to pave a street is required, by law, to be let to the lowest responsible bidder, an ordinance requiring the paving cement to be prepared from asphaltum

"obtained from Pitch lake, in the island of Trinidad," tends to create a monopoly, and to prevent competition, where it is shown that such lake is owned by a single corporation, and that the asphaltum obtained from it is no better than that obtained elsewhere and used by competing cement manufacturers. It is, therefore, void, and such evidence is admissible to show its invalidity, though it does not appear from the face of the ordinance that its effect is to create a monopoly or to prevent competition.

**MUNICIPAL CORPORATIONS—ORDINANCES TO AVOID CREATING A MONOPOLY OR PREVENTING COMPETITION—PROPER FORM OF.**—It is not necessary to foster and create a monopoly, and prevent competition in the letting of public contracts, by providing in ordinances that a certain substance or article, and no other, shall be used for a public improvement. If some particular material, controlled by a single person or corporation, is desired, the ordinance should be so framed as to make that material the standard of quality and fitness, and to require that material equal to it, in all respects, must be employed.

Wilson, Moore & McIlvaine and Charles D. Richards, for the appellants.

**339** **BOGGS, J.** This was a petition for judgment confirming a special assessment to defray the expense of improving Gladys avenue, in the city of Chicago. Objections interposed by the appellant were overruled and judgment entered in accordance with the prayer of the petition. This is an appeal to bring the judgment into review in this court.

The ordinance provides that "the cementing material shall be a paving cement prepared from refined Trinidad asphaltum obtained from Pitch lake, in the island of Trinidad," and the objection is, that the effect of this provision is to prevent competition among those desiring to contract to perform such work and furnish the material necessary to complete the improvement. It is conceded this alleged objection does not appear from the face of the ordinance, but appellants offered to produce evidence to show said Pitch lake in the island of Trinidad is, and was when the ordinance was passed, the private property and under the absolute control of the Barber Asphalt Company; that said Barber Asphalt Company is a private corporation, having its principal office in the city of Chicago; that there were at least five other companies or corporations having offices in the city of Chicago engaged in the business of selling asphaltum procured in the island of Trinidad for street paving, but <sup>340</sup> not procured at Pitch lake in said island, but which asphaltum was equal for street paving purposes to the asphaltum obtained from said Pitch lake, and that all of said companies and said Barber Asphalt Company were competitors in the business of supplying asphaltum for paving streets in the city of Chicago.



It is a well-settled general rule that all contracts in which the public are interested which tend to prevent competition, whenever a statute or known rule of law requires competition, are void: *Chicago v. Rumpff*, 45 Ill. 90; 92 Am. Dec. 196; *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 17 Am. St. Rep. 319; *Foss v. Cummings*, 149 Ill. 353; 1 Addison on Contracts, 273; 2 Beach on Modern Law of Contract, sec. 1108.

The statute, by the authority of which the city council enacted the ordinance under consideration, provides as follows: "All contracts for the making of any public improvement, to be paid for in whole or in part by a special assessment, and any work or other public improvement, when the expense thereof shall exceed five hundred dollars, shall be let to the lowest responsible bidder, in the manner to be prescribed by ordinance—such contract to be approved by the mayor or president of the board of trustees: Provided, however, any such contract may be entered into by the proper officer without advertising for bids, and without such approval, by a vote of two-thirds of all the aldermen or trustees elected": 1 Starr and Curtis' Statutes 1896, c. 24, par. 166, p. 777.

The ordinance in question provided the contract to perform the work should be awarded to the lowest responsible bidder. If the requirement that the asphaltum to be used in the improvement should be obtained from Pitch lake, in the island of Trinidad, tended to restrict competition among those who might desire to become bidders for the performance of the work of improving the street, or tended to create a monopoly in favor of any one having for sale the asphaltum necessary to be used in the work of paving the said street, it would <sup>341</sup> fall under the ban of this general rule of the law, and should be declared inoperative and void. It does not appear from the face of the ordinance that the effect is necessarily to so prevent competition or create a monopoly, but the proffered proof, which the court excluded, unmistakably disclosed that the asphaltum required by the ordinance to be used in making the street was a product which could only be obtained by purchase from a single corporation. The direct effect of the requirement, therefore, was to create a monopoly in favor of that corporation and to restrict competition in bidding accordingly.

The principle under which the rejected evidence under consideration must be, as it is, held by us to be competent, came before this court for discussion in the cases of *Chicago v. Rumpff*, and *Chicago v. Turner*, which cases were consolidated and de-

cided together, and are reported in 45 Ill. 90, 92 Am. Dec. 196. The conclusion of the court was that the ordinance then under consideration tended necessarily to create a monopoly and was therefore void; and the doctrine of the case is approved in *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, and *Foss v. Cummings*, 149 Ill. 353.

The only cases to which we have been referred which support the view that a city, when providing by ordinance for a public improvement where the work is to be done and materials to be furnished by the lowest responsible bidder, may, by provisions in the ordinance, restrict the bidders to or provide for use of an article solely controlled by one person, are cases where the city desired to use some patented article or process covered by a patent. The supreme courts of Michigan and of New York (in the former state by a divided court) entertained the view that an ordinance which provided a contract should be let to the lowest bidder for the improvement of the street by the use of a designated patented pavement was valid, and the decision of the supreme court of Kansas in *Yarnold v. Lawrence*, 15 Kan. 126, is frequently cited as <sup>342</sup> an authority in support of the same view of the question. In *Yarnold v. Lawrence*, 15 Kan. 126, the decision was rested upon the ground the statute of that state did not require the contract in question should be let to the lowest bidder, and for that reason that court upheld the ordinance without deciding the question here involved. The supreme court of Wisconsin and other states have adopted the view that such ordinances are void, and Mr. Dillon, after discussing the question in the first volume of his work on *Municipal Corporations*, section 469, says: "The question is close, but there seems so far a tendency in the courts to adopt the Wisconsin view."

In all of the cases where an ordinance has been held valid which provided for the use of some patented article or process, the argument most relied upon by the courts to justify the view the ordinance was valid is, that municipal corporations ought not to be denied the right to avail themselves of the advantages arising from the discoveries and inventions of the age, and that when the general government protected a discovery or invention by a patent, which created a monopoly therein, competition in the purchase or use of such patented article or process became impossible, and that the monopoly which it was urged the ordinance tended to create in fact had legal existence entirely independently of the ordinance, and that there-

fore the ordinance did not have any effect to create a monopoly or prevent competition among bidders. In Mr. Dillon's view these cases are rather overcome by the current of authority, but if they should be accepted as stating the correct rule they have little application to the case in hand, for the reason the monopoly created under the ordinance under consideration is not in favor of a patented article. The asphaltum offered for sale by the Barber Asphalt Company has no superior legal right in the markets and is not entitled to be given any by the terms of the ordinance, nor is it lawful for the ordinance to give it an improper preference, but it should <sup>343</sup> be left to depend upon its merits for any monopoly it may obtain in the good opinion of the public.

But it may be said, cities, in the construction of public improvements, ought to have, as have individuals in the construction of private structures, the right to select for use the article or substance best fitted and adapted to the purpose, and that to deprive the public of the right to select and use such superior articles is opposed to public policy and positively disadvantageous to the public. The force of this argument must, of course, be admitted; but upon reflection it is readily seen it is not necessary to foster and create a monopoly, and prevent competition in the letting of public contracts, by providing in ordinances that a certain substance or article, and no other, shall be used. If it be the judgment of the city council that the most suitable and best material to be used in any contemplated improvement is the product of some particular mine or quarry, or some substance or compound which is in the control of some particular firm or corporation, the ordinance might be so framed as to make such production, substance or compound the standard of quality and fitness, and to require that material equal in all respects to it should be employed. An ordinance making it indispensable that an article or substance in the control of but a certain person or corporation shall be used in the construction of a public work must necessarily create a monopoly in favor of such person or corporation, and also limit the persons bidding to those who may be able to make the most advantageous terms with the favored person or corporation. If all the ordinances adopted by the city council of the city of Chicago providing for the paving of streets and public places in the city should select the stock in trade of a particular firm or corporation as the only material to be used in making such street improvements, the evil would be intolerable; and



if they may lawfully select such article in one ordinance it cannot be unlawful to make it the <sup>344</sup> settled policy of the city that material for paving streets shall be purchased of but one seller.

Because of the error of the court in ruling the proffered testimony was inadmissible, the judgment must be reversed and the cause remanded.

Reversed and remanded.

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**MONOPOLIES—PUBLIC BUSINESS—INVALIDITY.**—Whatever tends to create a monopoly, and to prevent competition between those engaged in a public employment or business impressed with a public character, is opposed to public policy, and therefore unlawful: *People v. Chicago etc. Trust Co.*, 130 Ill. 268; 17 Am. St. Rep. 319.

**EVIDENCE—PAROL—THE ILLEGALITY OF A WRITTEN INSTRUMENT** may be shown by parol evidence: *Marston v. Kennebec Mut. Life Ins. Co.*, 89 Me. 266; 56 Am. St. Rep. 412, and note.

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## HOEFFER v. CLOGAN.

[171 ILLINOIS, 462.]

**APPEAL—FREEHOLD IS INVOLVED, WHEN.**—In a suit brought to construe a will and to determine the validity of a devise of real estate therein contained, a freehold is involved upon an appeal from a decree holding that a specific devise of the fee simple title is void, and that such title passes under the residuary clause of the will.

**CHARITIES—SUITS—PROPER PARTIES DEFENDANT.**—In a suit brought to construe a will and to determine the validity of a charitable bequest and devise therein contained, made to the officers and trustees of an unincorporated religious society, such officers and trustees are proper parties defendant, and may appeal from a decree holding the bequest and devise to be invalid.

**CHARITIES—JURISDICTION OF EQUITY—STATUTE OF CHARITABLE USES.**—The jurisdiction of equity over charitable uses was not derived from the statute of charitable uses, 43 Elizabeth, chapter 4. Prior to, and independently of, that statute, charities were sustained, irrespective of indefiniteness of the beneficiaries, or the lack of trustees, or the fact that the trustees appointed were not competent to take.

**CHARITIES—STATUTE OF CHARITABLE USES—LAW OF ILLINOIS.**—The doctrine of charitable uses is a part of the law of the state of Illinois, and the statute of charitable uses, 43 Elizabeth, chapter 4, is a part of the common law of the state.

**CHARITIES—"CHARITABLE" PURPOSE—HOW DETERMINED.**—In the state of Illinois, the statute of charitable uses, 43 Elizabeth, chapter 4, is considered in determining the general spirit and intent of the term, "charitable," and the objects which are to be regarded as charitable.

**CHARITIES—CHARITABLE TRUST—DEFINITIONS.**—A charity is a gift to be applied, consistently with existing laws, for

the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. Any trust, coming within this definition, for the benefit of an indefinite class of persons, sufficiently designated to indicate the intention of the donor, and constituting some portion or class of the public, is a charitable trust.

**CHARITIES—NAME IS NOT MATERIAL, BUT PURPOSE IS.**—In determining what is to be regarded as a charitable gift, it is immaterial whether the purpose is called "charitable" in the gift itself, if it is so described as to show that it is charitable in its nature.

**CHARITIES—SUPERSTITIOUS USES—MASSES FOR REPOSE OF SOULS.**—The doctrine of superstitious uses arising from the statute, 1 Edward VI, chapter 14, under which devises for procuring masses were held to be void, is not in force in the state of Illinois, and has never obtained in the United States.

**CHARITIES—MASSES FOR REPOSE OF SOULS—VALID BEQUEST.**—A devise of real estate to an unincorporated religious society, in trust, the property to be sold, and the proceeds expended for saying masses for the repose of the testator's soul, and the souls of his relatives, is a valid charitable bequest.

**CHARITIES—TRUST WILL NOT FAIL FOR WANT OF TRUSTEE.**—A devise of real estate and bequest of money to an unincorporated religious society, in trust, for a charitable purpose, such as saying masses for the repose of souls, will not be allowed to fail for want of a competent trustee, for the court will appoint one to take the gifts and apply them to the purposes of the trust.

William Dillon, for the appellants.

A. J. Redmond and Avery R. Hayes, for the appellees.

<sup>464</sup> **CARTWRIGHT, J.** Andrew Clogan, of Chicago, died June 6, 1892, leaving a last will and testament, which was admitted to probate and letters testamentary were issued to the executor, <sup>465</sup> James Clogan. The fourth and fifth clauses of the will are as follows:

"Fourth—I give and devise unto the Holy Family Church (on West Twelfth street), its successors and assigns, lot 56 in Sharp & Smith's subdivision of block 42, in the canal trustees' subdivision of the west one-half (W. 1-2) of the west one-half (W. 1-2) of the north east quarter (N. E. 1-4) of section seventeen (17), town thirty-nine (39) north, range fourteen (14) east of the third principal meridian, in Chicago, Cook county, Illinois, together with the building and improvements thereon, in trust for the following purposes: to sell the same and expend the proceeds of said sale in saying masses for the repose of my soul and the souls of my deceased wife, Margaret Clogan, my mother in law, Ellen Hurley, and my brother in law, James Hurley.

"Fifth—I give and bequeath unto the Holy Family Church (on West Twelfth street) the sum of \$1000 in trust, to be expended in saying masses for the repose of my soul and the soul of my deceased father, Patrick Clogan, mother, Julia Clogan, and sister, Margaret Clogan."

By the will the testator also directed the expenditure of two hundred and fifty dollars in erecting a monument on his lot in Calvary cemetery, bequeathed five hundred dollars to his sister Mary Daly, and devised certain real estate to his brother, Patrick Clogan, and his nephew, the executor, James Clogan, and by the seventh clause said James Clogan was made residuary devisee.

On March 17, 1896, said Patrick Clogan purchased from said James Clogan all his interest as residuary devisee in the property mentioned in the fourth clause of the will, and afterward filed the bill in this case alleging the above facts, and averring that there was no society or corporation in Chicago, on West Twelfth street, known as the Holy Family Church, but that there was an unincorporated religious society known as the Holy Family Parish which had a church on West Twelfth street, and <sup>466</sup> that the title to said church was in the appellants, clergymen, who are, respectively, rector, assistant rector, and treasurer of said Holy Family Parish, and their successors, as such, in trust for the purposes of the Society of Jesus, including the maintenance of the church for the benefit of the Holy Family Parish. The Holy Family Church, James Clogan, in his own right and as executor, Mary Daly and appellants, were made defendants. The prayer of the bill was, that the will should be construed and the validity of the devise and bequest to be expended in saying masses for the repose of souls should be determined. James Clogan and Mary Daly answered, admitting the allegations of the bill. The amended answer of appellants admitted the facts alleged in the bill, and averred that the church referred to therein was commonly known as the Holy Family Church, and was the only one in Chicago of that name; that the mass was a solemn act of worship according to the belief and practice of the Roman Catholic Church; that mass was celebrated several times each day at the said Holy Family Church, and that whenever mass was so celebrated the doors of the church were open, and such of the public as might desire to worship at such celebration of mass were admitted to do so. The cause was heard on the bill and answers so filed, and the court decreed the fourth and fifth clauses of the will null and void; that the title



to the lot therein described was vested in Patrick Clogan, as grantee of the residuary devisee, and that the one thousand dollars mentioned in the fifth clause should be paid to the residuary legatee, James Clogan, in due course of administration. An appeal to this court was prayed by appellants and allowed by the court.

Appellee Patrick Clogan has moved to dismiss the appeal for want of jurisdiction, and because appellants have no interest in the cause. The purpose of the bill was to settle the question whether the fee simple title to the lot described in the fourth clause of the will passed under <sup>467</sup> that clause, or whether the attempted devise was void and the title passed to the residuary devisee under the seventh clause. The decree of the circuit court held the devise of the freehold by the fourth clause void, and established title in Patrick Clogan. A freehold is involved in the appeal from that decree. Appellants are the officers of the Holy Family Parish, and trustees representing the religious society to which the devise was made. They were made defendants to the bill as representing such society, and their official relation to the parish and church makes them proper parties to represent it in the question of the true construction of the will and the validity of the devise and bequest. The motion to dismiss the appeal is denied.

The devise and bequest were made to the Holy Family Church in trust for a specific purpose, which was, that the church expend the proceeds of the sale of the real estate and the amount of the bequest in masses for the repose of the souls of the persons named. They were not intended as gifts to the church for its general uses, and any other application than that specified in the will would contravene the purpose of the testator. This being so, it is claimed that the trust is void, because it is a private trust with the souls of particular deceased persons as beneficiaries, none of whom can come into court and call the trustees to account or enforce its execution and also for want of a trustee capable of taking legal title to the property. On the other hand, it is claimed that the devise and legacy are for a charitable use within the meaning and spirit of the doctrine on that subject, and if this position is correct, the rules of law which would invalidate them as an express private trust will not affect their validity.

The doctrine of charitable uses has been repeatedly held to be a part of the law of this state. The equitable jurisdiction over such trusts was not derived from the statute of charitable

uses (43 Eliz. c. 4), but prior <sup>468</sup> to and independently of that statute charities were sustained, irrespective of indefiniteness of the beneficiaries or the lack of trustees or the fact that the trustees appointed were not competent to take: *Heuser v. Harris*, 42 Ill. 425; *Vidal v. Girard*, 2 How. 127. The statute, however, became a part of the common law of this state: *Heuser v. Harris*, 42 Ill. 425; *Hunt v. Fowler*, 121 Ill. 269; *Andrews v. Andrews*, 110 Ill. 223.

The statute of charitable uses of Elizabeth has, since its passage, been considered as showing the general spirit and intent of the term "charitable," and the objects which come within such general spirit and intendment are to be so regarded. The definition given by Mr. Justice Gray in the case of *Jackson v. Phillips*, 14 Allen, 539, was adopted and approved by this court in the case of *Crerar v. Williams*, 145 Ill. 625. It is as follows: "A charity, in a legal sense, may be more fully defined as a gift, to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burthens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." Any trust coming within this definition for the benefit of an indefinite class of persons sufficiently designated to indicate the intention of the donor, and constituting some portion or class of the public, is a charitable trust. Among such objects are the support and propagation of religion and the maintenance of religious services (*Andrews v. Andrews*, 110 Ill. 223), to pay the expense of preaching and salary of rectors (*Alden v. St. Peter's Parish*, 158 Ill. 631), or the preaching of an annual sermon in memory of the testator: *Duror v. Motteux*, 1 Ves. Sr. 321.

<sup>469</sup> The doctrine of superstitious uses arising from the statute 1 Edward VI, chapter 14, under which devises for procuring masses were held to be void, is of no force in this state and has never obtained in the United States. In this country there is absolute religious equality, and no discrimination, in law, is made between different religious creeds or forms of worship. It cannot be denied that bequests for the general advancement of the Roman Catholic religion, the support of its forms of worship or the benefit of its clergy, are charitable, equally with those

for the support or propagation of any other form of religious belief or worship. The nature of the mass, like preaching, prayer, the communion, and other forms of worship, is well understood. It is intended as a repetition of the sacrifice on the cross, Christ offering Himself again through the hands of the priest and asking pardon for sinners as He did on the cross, and it is the chief and central act of worship in the Roman Catholic Church. It is a public and external form of worship, a ceremonial which constitutes a visible action. It may be said for any special purpose, but from a liturgical point of view every mass is practically the same. The Roman Catholic Church believes that christians who leave this world without having sufficiently expiated their sins are obliged to suffer a temporary penalty in the other, and among the special purposes for which masses may be said is the remission of this penalty. A bequest for such special purpose merely adds a particular remembrance to the mass, and does not, in our opinion, change the character of the religious service and render it a mere private benefit. While the testator may have a belief that it will benefit his soul or the souls of others doing penance for their sins, it is also a benefit to all others who may attend or participate in it. An act of public worship would certainly not be deprived of that character because it was also a special memorial of some person,<sup>470</sup> or because special prayers should be included in the services for particular persons. Memorial services are often held in churches, but they are not less public acts of worship because of their memorial character, and in *Duror v. Motteux*, 1 Ves. Sr. 321, the trust for the preaching of an annual sermon in memory of the testator was held to be a charitable use. The mere fact that the bequest was given with the intention of obtaining some benefit or from some personal motive does not rob it of its character as charitable. The masses said in the Holy Family Church were public, and the presumption would be that the public would be admitted, the same as at any other act of worship of any other christian sect. The bequest is not only for an act of religious worship, but it is an aid to the support of the clergy. Although the money paid is not regarded as a purchase of the mass, yet it is retained by the clergy, and, of course, aids in the maintenance of the priesthood.

In the case of *Schouler*, Petitioner, 134 Mass. 426, it was held that a bequest of money for masses was a good charitable bequest of the testatrix, and the court said: "Masses are religious ceremonials or observances of the church of which she was a



member, and come within the religious or pious uses which are upheld as public charities." So in Pennsylvania, it has been held that a bequest to be expended in masses for the repose of souls is a religious or charitable bequest under the statute: *Rhymer's Appeal*, 93 Pa. St. 142; 39 Am. Rep. 736; *Seibert's Appeal*, 18 Week. Not. Cas. 276. A recent case decided in the Irish courts, January 24, 1897, is *Attorney General v. Hall*. It was held unanimously, both in the exchequer and the court of appeals, that a bequest for saying masses for the soul of a deceased person was a good charitable bequest.

In New York and Wisconsin it has been held that a trust of this character is void for the want of a definite beneficiary to enforce its execution: *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 420; *McHugh v. McCole*, (Wis., Oct. 27, 1897). But the decisions in those states are readily distinguishable from the rule in this state. In New York charitable uses were abolished by legislation, and in all valid trusts there must be a definite and certain beneficiary to take the equitable title, unless the act of 1893, which is said to have resulted from the decision in *Tilden v. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487, has enlarged or relaxed the rule as to a definite beneficiary. In Wisconsin all trusts are abolished by statute, except certain specific trusts where there is certainty in the beneficiaries, and in that state bequests have been held to be void which have been uniformly sustained in this court as for charitable purposes. The decision in *McHugh v. McCole* (Wis., Oct. 27, 1897), was upon the ground that the doctrine of charitable uses was not in force in that state, and that a trust, to be sustained, must be of a clear and definite nature, and the beneficiary interest to every person therein must be fully expressed and clearly defined upon the face of the instrument. The will in that case gave a certain sum of money to the Roman Catholic bishop of the diocese of Green Bay, Wisconsin, to be used and applied in specified amounts for masses for the repose of testator's soul and the souls of certain named persons. It was held invalid solely on the ground that the provision amounted to a trust which, under the statutes of that state, was invalid. It was said that if the testator had made a direct bequest of the sum in question to Bishop Messmer, or to any bishop or priest, for masses for the repose of the souls of persons named in his will it would be valid, and the court said: "We know of no legal reason why any person of the Catholic faith, believing in the efficacy of masses, may not make a direct gift or bequest to any bishop or priest of any sum out of his property or

estate for masses for the repose of his soul or the souls of others, as he may choose." The court expressed regret that the intention of the testator could not be given effect because he had put it in the form of a trust provision. So, also, in *New York* it has been held in several cases that a bequest to a named priest for the saying of masses for the repose of the souls of specified persons is valid: *Ruppel v. Schlegel*, 55 Hun, 183; *In re Howard's Estate*, 5 Misc. Rep. (N. Y.) 295; *Vanderveer v. McKane*, 25 Abb. N. C. 105.

The case of *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 53 Am. St. Rep. 48, holds that a bequest to that church in the city of Mobile, to be used in solemn mass for the repose of testator's soul, could not be supported as a charitable bequest. The decision seems to be on the ground that the testator's own soul was the exclusive object and beneficiary of the trust, and that no public benefit was to be derived from it and no living person was able to call the trustee to account. We are not able to agree with the conclusion that there is no benefit to the church or public in such case, and, as we have seen, the ceremonial of the mass is a public action which can be seen and taken cognizance of, so that there is no more difficulty in procuring a mass to be said than there is in securing the public delivery of a sermon or a lecture. A bequest for the erection of a public statue or monument to a distinguished person is a good charitable bequest, and yet such person, if deceased, could not enforce its execution, but the courts could and would do it.

We think the devise and legacy charitable, and a rule applicable to trusts is that they will not be allowed to fail for want of a competent trustee. The court will appoint a trustee or trustees to take the gifts and apply them to the purposes of the trust: *Heuser v. Harris*, 42 Ill. 425.

The decree of the circuit court is reversed and the cause is remanded, with directions to proceed in conformity with the views herein expressed. Reversed and remanded.

#### Charitable Uses or Trusts, What Are.\*

*Charitable Uses or Trusts—Definitions.*—The definition of the word "charity," given by Mr. Justice Gray in *Jackson v. Phillips*, 14

#### \*REFERENCES TO MONOGRAPHIC NOTES.

What is a public charity: 38 Am. Rep. 300-303.

Religious use: 39 Am. Rep. 738-741.

Trust, enforceable in part: 39 Am. Rep. 742-750.

Trust for charity, preservation of private burying ground: 58 Am. Rep. 599-601.

Will, charity, uncertainty: 60 Am. Rep. 230-256.

Charitable uses: 9 Am. Dec. 577-588.

Charities void for uncertainty: 44 Am. Dec. 98-101.

Charitable uses and devises thereto: 67 Am. Dec. 184-185.

Perpetuities which are forbidden in the United States: 90 Am. Dec. 101-106.

The rule against perpetuities: 49 Am. St. Rep. 117-138.

Allen, 539, 556, and adopted in the principal case, and others, is probably as comprehensive and complete as any to be found in the books. A charitable or pious gift has been defined to be "whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives, and to these ends—free from the stain or taint of every consideration that is personal, private, or selfish": and this definition has been approved by the supreme court of Pennsylvania: *Price v. Maxwell*, 28 Pa. St. 23, 35. Lord Camden defined a charity as "a gift to a general public use, which extends to the poor as well as to the rich": *Jones v. Williams*, Amb. 651; *Mitford v. Reynolds*, 1 Phill. Ch. 185, 192. This definition was approved by Chancellor Kent, in *Coggeshall v. Pelton*, 7 Johns Ch. 292, 294, 11 Am. Dec. 471, and has been adopted by the supreme court of the United States: *Perin v. Carey*, 24 How. 465, 506; *Kain v. Gibboney*, 101 U. S. 362, 365. To constitute a charitable use, it must, therefore, confer a public benefit open to an indefinite number of persons: *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327; 53 Am. St. Rep. 48. It may, when neither the law nor public policy forbids, be applied to almost anything "that tends to promote the well-doing or well-being of social man": *Ould v. Washington Hospital*, 95 U. S. 303, 311; *Protestant etc. Soc. v. Churchman*, 80 Va. 718, 762. A charity may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity: *Russell v. Allen*, 107 U. S. 167. To give a gift the character of a public charity, there must appear to be some benefit to be conferred upon, or duty to be performed toward, either the public at large or some part thereof, or an indefinite class of persons: *Old South Soc. v. Crocker*, 119 Mass. 1; 20 Am. Rep. 299. It is said in the books that it is no charity to give to a friend, and that the thing given becomes a charity when the uncertainty of the recipients begin. "This is beautifully illustrated," it is said, "in the Jewish law, which required the sheaf to be left in the field, for the needy and passing stranger": *Fontain v. Ravenel*, 17 How. 369, 381.

On the whole, a charity is to be regarded as a gift for a public use. Such is its legal meaning: *Kain v. Gibboney*, 101 U. S. 362, 365. It was concluded in a late Rhode Island case that a charitable trust, in a legal sense, is one which originates from a gift, and which limits property to any public use to which it is lawful to devote property forever. The legality of such appropriation may be established by general rules of law, or by special act of the sovereign power. In either case, if the use is public, the trust is a charity: *Webster v. Wiggin*, 19 R. I. 73, 99, per Douglas, J. Equity will uphold a trust to protect citizens of African descent in the enjoyment of their civil rights, and to prevent discrimination against them: *Lewis' Estate*, 152 Pa. St. 477. All gifts and grants in trust, for the support of public worship and religious instruction, or for the advancement of piety, morality, and useful education, are valid as charitable trusts, and will be carried into effect by a court of



equity: *Earle v. Wood*, 8 Cush. 430, 445. A bequest to a missionary society named, for the benefit of poor churches of a designated city and vicinity, is a valid bequest to a public charity: *McAlister v. Burgess*, 161 Mass. 269. So, equity has sustained the bequest of a fund to be distributed "among, and applied to, such objects and purposes of benevolence or charity, public or private, including educational or charitable institutions and the relief of individual need, regardless of nationality or color, as the trustees for the time being shall deem worthy thereof," as a good public charitable bequest: *Weber v. Bryant*, 161 Mass. 400. See, *infra*, as to the validity of a bequest for "benevolent" purposes. In a bequest toward the establishment of a permanent fund for the charitable assistance and benefit of indigent Protestant females over the age of eighteen years, residents of a designated city, the word "benefit," in the phrase, "charitable assistance and benefit," is qualified by the word, "charitable," and cannot, therefore, be taken to mean a benefit that is not, in its nature, charitable, as understood by the law: *Tappan's Appeal*, 52 Conn. 412.

A charity is a gift to promote the welfare of others: *Philadelphia v. Masonic Home*, 160 Pa. St. 572; 40 Am. St. Rep. 736. The true test of a legal public charity is the object sought to be attained, the purpose to which the gift is to be applied, and not the motive of the donor: *Fire Ins. Patrol v. Boyd*, 120 Pa. St. 624; 6 Am. St. Rep. 745. A charity may restrict its admissions to a class of humanity and yet be public in its nature, and so long as the classification is determined by some distinction which involuntarily affects, or may affect, any of the whole people, although only a small number may be directly benefited, the charity is public: *Philadelphia v. Masonic Home*, 160 Pa. St. 572; 40 Am. St. Rep. 736. An insurance patrol company is a public charity when the object of its incorporation is to protect and save life and property in, and contiguous to, burning buildings, it appearing that the company makes no distinction in saving and protecting property, between property insured and not insured, and that it is without capital stock or moneyed capital, and no profits or dividends have been made and divided among the corporators, although it is supported by the voluntary contributions of fire insurance companies: *Fire Ins. Patrol v. Boyd*, 120 Pa. St. 624; 6 Am. St. Rep. 745. When the right to share in the benefits of a charity depends on the fact of voluntary association with some particular society, while all, not members of such society, are excluded, the charity is not purely public in its nature. Thus, a home for the relief of aged and indigent Masons only, though supported by voluntary contributions, without charge to the beneficiaries, and without profit to the institution or its officers, is not a "purely public charity": *Philadelphia v. Masonic Home*, 160 Pa. St. 572; 40 Am. St. Rep. 736. A gift, by will, to a supposititious and nonexistent corporation, by name, is not a public charity: *Stratton v. Physio-Medical College*, 149 Mass. 505; 14 Am. St. Rep. 442. A gift for the erection of a house for public worship, or for the use of the ministry, may constitute a public

charity, if there is no definite body for whose use the gift was intended, capable of receiving, holding, and using it in the manner intended. But, if there is a body, or a definite number of persons, ascertained or ascertainable, clearly pointed out by the terms of the gift to receive, control, and enjoy its benefits, it is not a public charity, however carefully and exclusively the trust may be restricted to religious uses alone: *Old South Soc. v. Crocker*, 119 Mass. 1; 20 Am. Rep. 299. A hospital, with the necessary grounds, free to all who are not pecuniarily able, and supported partly by private contributions and partly by fees from patients, but producing no profit, is a purely "public charity": *Henepin v. Brotherhood of Gethsemane*, 27 Minn. 460; 38 Am. Rep. 298.

A gift to a lodge of Free Masons "for the good of the craft, or for the relief of indigent and distressed worthy Masons, their widows, and orphans," and for other charitable purposes of the lodge, seems to be a valid charitable use or trust: *Duke v. Fuller*, 9 N. H. 536; 32 Am. Dec. 392; *Indianapolis v. Grand Lodge*, 25 Ind. 518; *King v. Parker*, 9 Cush. 71; *Vander Volgen v. Yates*, 3 Barb. Ch. 242; though it has been held that a Masonic lodge is not a purely charitable or benevolent institution: *Bangor v. Masonic Lodge*, 73 Me. 428; 40 Am. Rep. 369; and that a lodge of Odd Fellows is not a charitable institution: *Babb v. Reed*, 5 Rawle, 151; 28 Am. Dec. 650. A Masonic lodge may hold property as a trustee but that does not, of course make it a charitable institution: *Everett v. Carr*, 59 Me. 325. It is not necessary, under the laws of the state of New York, that an institution should be wholly charitable to fall within the provisions of the constitution and statutes of that state, placing charitable institutions under the supervision and control of the state board of charities. It is sufficient if the institution is partly charitable in its character and purpose; and, if it is partly educational, that does not exclude it from those provisions. Hence, if it is both educational and charitable, it falls within those provisions; and this applies to the New York Institution for the Blind, an institution under private control, but which is, to a certain extent, charitable, as well as educational. The word "charitable," as used in the laws mentioned, is given only its usual and ordinary meaning: *People v. Fitch*, 154 N. Y. 14. A friendly society established to provide, by subscriptions, contributions, and fines, an "invested fund" for the relief, by means of annuities, of members, their widows and children, if in "distressed circumstances," has been upheld in chancery as a charity: *In re Buck* (1896), 2 Ch. 727. A society for the suppression and abolition of vivisection is a charity within the legal definition of that term: *In re Foveaux* (1895), 2 Ch. 501. While much of the work of a corporation, which has no capital stock, and which applies all of its revenues to the purposes of its organization, may be of a charitable nature, yet, if its purposes are also social, and include the giving of lectures and of theatrical and other entertainments for the benefit of its members, the provision of a gymnasium and of athletic sports for promoting their health, and the sale of food at a coffee or lunch counter, the corporation is not a public

charitable corporation, but one established for the peculiar benefit of its members: *Chapin v. Holyoke etc. Assn.*, 165 Mass. 280. The words "charitable corporation" do not include what is generally called a "religious corporation": *De Wolf v. Lawson*, 61 Wis. 469; 50 Am. Rep. 148; but a corporation having for its sole object the education and instruction of the deaf and dumb, supporting and instructing indigent persons of that class gratuitously, and receiving a pecuniary compensation from pupils able to make it; deriving its means of dispensing charity from the donations of individuals and of the public, and applying its funds exclusively to the general object of the institution, is a charitable corporation: *American Asylum v. Phoenix Bank*, 4 Conn. 172; 10 Am. Dec. 112. It appears from what is said above that charity, in a legal sense, is rather a matter of description than of definition: *Perin v. Carey*, 24 How. 465, 494.

*Statute of Uses—Common Law.*—The statute of uses, 43 Elizabeth, chapter 4, in its preamble, names twenty-one distinct charities. They are: 1. The relief of aged, poor, and impotent people; 2. The maintenance of sick and maimed soldiers; 3. The maintenance of schools of learning; 4. The maintenance of free schools; 5. The maintenance of scholars in universities; 6. The maintenance of houses of correction; 7. The repair of bridges; 8. The repair of ports and havens; 9. The repair of causeways; 10. The repair of churches; 11. The repair of seabanks; 12. The repair of highways; 13. The education and preferment of orphans; 14. The marriage of poor maids; 15. The support and help of young tradesmen; 16. The support and help of handicraftsmen; 17. The support and help of persons decayed; 18. The redemption or relief of prisoners or captives; 19-21. Aid or ease of poor inhabitants concerning the payment of fifteens; the setting out of soldiers; and other taxes. But, upon examining the earlier English statutes and decisions of the courts of law and equity, Mr. Justice Baldwin, in an elaborate, learned, and masterly opinion, in *Magill v. Brown*, Bright. 394, found forty-six specifications of pious and charitable uses recognized as within the protection of the law, and in which were embraced all that are enumerated in the statute, 43 Elizabeth. The following is a list of those pious and charitable uses: 1. Gifts for the exercise and celebration of divine service, to find a chaplain, a taper to burn before an image, prayers for souls, the defense of the church, obits, or service of a priest; 2. Free alms, liberal almsgiving, and relief of the poor; these were gifts in frankalmoinage, and were good at common law; 3. Hospitalities; 4. All other offices and services before time due, by whatever name; 5. The employment of a vicar to inform the people, etc; 6. Lazars in hospitals; 7. Men out of their wits; 8. Poor women with child; nourishing, relieving, and refreshing other poor people; 9. The discharge of tolls and tollages to be levied to relieve the poor; 10. The cleansing of streets; 11. Good, virtuous, and charitable deeds; 12. Erecting grammar schools and the maintenance of schoolmasters and ushers; 13. The further augmentation of the universities; 14. The support of preachers, priests, and vicars, and par-



sons; 15. The maintenance of pierwalls and seabanks; 16. The relief of poor men, being students or otherwise; 17. Repairing bridges and walls; 18. Setting poor people at work; 19. The resuscitation of alms, prayer, and example of good life; 20. The relief of prisoners; 21. The repair of churches; 22. The maintenance of the poor in houses of correction; 23. For impotent and maimed soldiers; 24. For hurt and maimed mariners; 25. The maintenance of houses of correction and abiding houses; 26. For stocks and stores for them, and the use of the poor; 27. To erect and found hospitals; 28. Schools of learning, colleges, and hospitals, for the relief of the poor; 29. For the relief of orphans and fatherless children; 30. And such like good and lawful charities; 31. Repairing bridges and roads; and making bridges and beacons; 32. Maintenance of free schools and poor scholars; 33. Or such other good, lawful, and charitable purposes and intents; 34. The true labor and exercise of husbandry, recited as profitable to the commonwealth and pleasing to God; 35. The bringing up of apprentices of both sexes in trades and manual occupations; 36. The making of a stock for poor laborers in husbandry, and poor apprentices, and to set them at work; 37. For chapels of ease, erected as members of parochial churches; 38. For erecting cathedrals and furnishing money for their support; 39. For the advancement of religion and learning, and the maintenance of the poor; 40. For public benefit; 41. Works of piety and charity, or any other charitable use; 42. Poor men decayed by misfortune, or the visitation of God; 43. Persons imprisoned for conscience sake; 44. A bell for a church, pulpit cushion and cloth, for a sessionhouse, or for the ornament of a church, or vestments for service; 45. The marriage of poor maidens; 46. For any charitable use; and such uses as concur in decency and good order with the intent of the founder.

The statutes and authorities supporting these pious and charitable uses will be found cited in *Magill v. Brown*, Bright, 394, 395. It may here be remarked that these uses were denominated "charitable," to distinguish them from others designated "superstitions," which were obnoxious to, and forbidden by, the English law. If lands, tenements, rents, goods, or chattels were given, secured, or appointed for and toward the maintenance of a priest and chaplain to say mass; for the maintenance of a priest or other man to pray for the soul of any dead man, in such a church or elsewhere; or to have and maintain perpetual obits, lamps, torches, etc., to be used at certain times to help save the souls of men out of purgatory; these and such like uses were declared to be superstitious: Bacon's *Abridgment*, Charitable Uses, D. But the statutes of Henry VIII and Edward VI, for the suppression of superstition, protected more cases of charity, and prescribed more liberal rules for their establishment and maintenance, than the 43 Elizabeth: *Magill v. Brown*, Bright, 394.

The statute of 43 Elizabeth, chapter 4, in principle and substance, so far as it recognizes, defines, or indicates what are charitable uses, is a part of the common law of some of the states of our Union.

It has not been, in express terms, either adopted or repealed in California: *Hinckley's Estate*, 58 Cal. 457; but it is recognized as a part of the common law in Connecticut: *American Bible Soc. v. Wetmore*, 17 Conn. 181, 189; *Adye v. Smith*, 44 Conn. 60; 26 Am. Rep. 424; in Georgia: *Jones v. Habersham*, 107 U. S. 174, 180; in Illinois: See principal case; *Crerar v. Williams*, 145 Ill. 625; *Hunt v. Fowler*, 121 Ill. 269, 276; *Andrews v. Andrews*, 110 Ill. 223; *Heuser v. Harris*, 42 Ill. 425, 432; in Kentucky: *Gass v. Willhite*, 2 Dana, 170; 26 Am. Dec. 446; *Moore v. Moore*, 4 Dana, 354; 29 Am. Dec. 417; *Curling v. Curling*, 8 Dana, 38; 33 Am. Dec. 475; *Cromie v. Louisville etc. Soc.*, 3 Bush, 365, 373; *Attorney General v. Wallace*, 7 B. Mon. 611, 618; in Maine: *Drew v. Wakefield*, 54 Me. 291; *Howard v. American Peace Soc.*, 49 Me. 288; *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Tappan v. Deblois*, 45 Me. 122, 131; *Simpson v. Welcome*, 72 Me. 496; 39 Am. Rep. 349; in Massachusetts: *Drury v. Inhabitants of Natick*, 10 Allen, 169, 177; *Dexter v. Gardner*, 7 Allen, 243, 246; *Tainter v. Clark*, 5 Allen, 66, 68; *Earle v. Wood*, 8 Cush. 430, 445; *Burbank v. Whitney*, 24 Pick. 146; 35 Am. Dec. 312; *Sanderson v. White*, 18 Pick. 328; 29 Am. Dec. 591; *Going v. Emery*, 16 Pick. 107; 26 Am. Dec. 645; *Bates v. Bates*, 134 Mass. 110; 45 Am. Rep. 305; in Missouri: *Chambers v. St. Louis*, 29 Mo. 543; in New Jersey: *De Camp v. Dobbins*, 29 N. J. Eq. 36, 43; *Thompson v. Norris*, 20 N. J. Eq., 489, 522; in North Carolina: *Griffin v. Graham*, 1 Hawks, 96; 9 Am. Dec. 619; in Ohio: *Perin v. Carey*, 24 How. 465; *Miller v. Teachout*, 24 Ohio St. 525; *Trustees v. Zanesville etc. Co.*, 9 Ohio, 203; 34 Am. Dec. 436; *Urmey v. Wooden*, 1 Ohio St. 160; 59 Am. Dec. 615; in Pennsylvania: *Vidal v. Girard*, 2 How. 126; *Zimmerman v. Anders*, 6 Watts & S. 218; 40 Am. Dec. 552; *Cresson's Appeal*, 30 Pa. St. 437, 450; *Domestic etc. Appeal*, 30 Pa. St. 425, 434; *Wright v. Linn*, 9 Pa. St. 433, 435; *Witman v. Lex*, 17 Serg. & R. 88; 17 Am. Dec. 644; *Methodist Church v. Remington*, 1 Watts, 218; 26 Am. Dec. 61; in Rhode Island: *Webster v. Wiggin*, 19 R. I. 73, 98; and, perhaps in some other states.

In other states, the statute of 43 Elizabeth is not in force. It is not in force in Delaware: *State v. Griffith*, 2 Del. Ch. 392, 413; in the District of Columbia: *Ould v. Washington Hospital*, 95 U. S. 303; in Indiana: *Grimes v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690; *Erskine v. Whitehead*, 84 Ind. 357; in Maryland: *Halsey v. Convention*, 75 Md. 275; *Columbia v. Washington Market Co.*, 3 McAr. 559, 578; in Michigan: *Trustees v. Clark*, 41 Mich. 730; in Mississippi: *Boorman v. Catlett*, 13 Smedes & M. 149, 152; in Tennessee: *Dickson v. Montgomery*, 1 Swan, 348; in Virginia: *Protestant etc. Soc. v. Churchman*, 80 Va. 718; *Gallego v. Attorney General*, 3 Leigh, 450; 24 Am. Dec. 650; or in Wisconsin: *Heiss v. Murphy*, 40 Wis. 276, 289.

But, the mere question as to whether the statute has been, in any particular state, adopted or repealed, in express terms, is not very material. Charities were known and recognized by the common law, independently of the statute, and it follows that wherever the principles of the common law are in force the law of charitable uses and trusts must also be in operation, so far as conformable with

our system, no matter whether the statute of Elizabeth has been re-enacted or not, if there is no law expressly prohibiting such uses or trusts: *Dickson v. Montgomery*, 1 Swan, 348. It is now conceded as settled that courts of equity have an original and inherent jurisdiction over charities, independently of the statute: *Russell v. Allen*, 107 U. S. 163, 166; *Kain v. Gibboney*, 101 U. S. 362, 366; *Ould v. Washington Hospital*, 95 U. S. 303; *Perin v. Carey*, 24 How. 465; *Shields v. Jolly*, 1 Rich. Eq. 99; 42 Am. Dec. 349; *Zimmerman v. Anders*, 6 Watts & S. 218; 40 Am. Dec. 552; *Urmey v. Wooden*, 1 Ohio St. 160; 59 Am. Dec. 615; *Reformed Protestant Church v. Mott*, 7 Paige, 77; 32 Am. Dec. 613; *Burr v. Smith*, 7 Vt. 241; 29 Am. Dec. 154; *Moore v. Moore*, 4 Dana. 354; 29 Am. Dec. 417; *Methodist Church v. Remington*, 1 Watts, 218; 26 Am. Dec. 61; *Griffin v. Graham*, 1 Hawks, 96; 9 Am. Dec. 619; *Witman v. Lex*, 17 Serg. & R. 88; 17 Am. Dec. 644; *Barnum v. Mayor*, 62 Md. 275; 50 Am. Rep. 219; *Grimes v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690; *Jackson v. Phillips*, 14 Allen, 539; *Carter v. Balfour*, 19 Ala. 814; *Williams v. Pearson*, 38 Ala. 299; *Hinckley's Estate*, 58 Cal. 457; *Heuser v. Harris*, 42 Ill. 425; *Lepage v. McNamara*, 5 Iowa, 124; *Tappan v. Deblois*, 45 Me. 122; *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Howard v. American Peace Soc.*, 49 Me. 288; *Drury v. Inhabitants of Natick*, 10 Allen, 169, 177; *Burbank v. Whitney*, 24 Pick. 146; 35 Am. Dec. 312; *Missouri Historical Soc. v. Academy of Science*, 94 Mo. 459; *Howe v. Wilson*, 91 Mo. 45; 60 Am. Rep. 226; *Halsey v. Convention*, 75 Md. 275; *Erschine v. Whitehead*, 84 Ind. 357, 365; *Chambers v. St. Louis*, 29 Mo. 543; *Derby v. Derby*, 4 R. I. 414, 436; *Vidal v. Girard*, 2 How. 127. *Contra*, *Gallego v. Attorney General*, 3 Leigh, 450; 24 Am. Dec. 650; *Dashiell v. Attorney General*, 5 Har. & J. 392; 9 Am. Dec. 572.

Courts of equity, as shown by the above cases, had an inherent jurisdiction over charities before the enactment of the statute, 43 Elizabeth, and have it now. The aim of that statute was to show, by familiar examples, what classes or kinds of uses were considered charitable, or so beneficial to the public as to be entitled to the same protection as strictly charitable uses, rather than to enumerate or specify all the purposes which would fall within the scope and intent of the statute, much less, every possible mode of carrying them out. The twenty-one classes of trusts referred to in that statute have been taken by the courts as criteria in passing upon the character of trusts claimed to be charitable, but the enumeration of that statute is not exhaustive, and courts of equity may sustain charities not specified in the statute as well as those enumerated therein: *Drury v. Inhabitants of Natick*, 10 Allen, 169, 177; *Webster v. Wiggin*, 19 R. I. 73, 98; *Earle v. Wood*, 8 Cush. 430, 445; *Shields v. Jolly*, 1 Rich. Eq. 99; 42 Am. Dec. 349. It is well settled that any purpose is charitable, in the legal sense of the word, which is within the principle and reason of the statute, although not expressly named in it; and many objects have been upheld as charities, which the statute neither mentions nor distinctly refers to: *Jackson v. Phillips*, 14 Allen, 539, 551. The consequence of the final determina-



tion, that courts of equity have an original and inherent jurisdiction over charities, independently of the statute, is important in this respect; "that courts of equity, in the various states, where they are not prohibited by statute, exercise an original, inherent jurisdiction in equity over charities, and apply to them the rules of equity, together with such other rules, applicable to charitable uses, as courts of equity may exercise under the constitution and laws of the several states; and the courts do this by virtue of their inherent powers, without reference to the question whether the statute has been technically adopted in their states": *Erskine v. Whitehead*, 84 Ind. 357, 365, per Woods, C. J.; *Williams v. Pearson*, 38 Ala. 299.

*Benevolence—Philanthropy—Charity at Large.*—A gift to be applied "for the promotion of agricultural or horticultural improvements, or other philosophical or philanthropic purposes," has been held a good charitable bequest: *Rotch v. Emerson*, 105 Mass. 431; and a trust for "benevolent" objects has been held valid: *Goodale v. Mooney*, 60 N. H. 528; 49 Am. Rep. 334; but there is a distinction between the words "charity" and "benevolent": *Hinckley's Estate*, 58 Cal. 457; and a gift solely for "benevolent" purposes is generally held to be void, for it is not a charity: *Chamberlain v. Stearns*, 111 Mass. 267; *Norris v. Thomson*, 19 N. J. Eq. 307, 313; *Adye v. Smith*, 44 Conn. 60; 26 Am. Rep. 424; *Babb v. Reed*, 5 Rawle, 151; 28 Am. Dec. 650. If the gift is in the alternative to "benevolent, religious, or charitable institutions," it is void, because, by force of the term "benevolent," objects are embraced which are not, in a legal sense, charities: *Thomson v. Norris*, 20 N. J. Eq. 489; and so a bequest "for some one or more purposes, charitable, philanthropic, or ,," is not bad because of the blank, but must be treated as one "for charitable or philanthropic purposes"; and, while the bequest may be valid, it is not good as a charitable bequest, because there may be philanthropic purposes which are not charitable: *In re Macduff* (1896), 2 Ch. 451. An institution may be both "charitable" and "benevolent": *In re Hewitt*, 94 Cal. 376.

The word "benevolent," however, is thrust into many bequests and devises for charitable purposes, and is intertwined, in endless ways, with other words of the context. Hence, if the word "benevolent," as used in such cases, or when coupled with the word "charitable," was plainly intended to be synonymous with the word "charitable," courts will give effect to the gift according to that intent: *Chamberlain v. Stearns*, 111 Mass. 267, 268; *Pell v. Mercer*, 14 R. I. 412, 443; *Weber v. Bryant*, 161 Mass. 400; *Saltonstall v. Sanders*, 11 Allen, 446; *Jones v. Habersham*, 107 U. S. 174; *De Camp v. Dobbins*, 29 N. J. Eq. 36, 43; but a trust, however liberal or benevolent, cannot be enforced, if it is not for a purpose understood by the court to be a charitable one: *Nash v. Morley*, 5 Beav. 177. In *Hinckley's Estate*, 58 Cal. 457, it was held that a trust in favor of "human beneficence" and "charity" might be valid in view of the context. A testamentary gift for purposes both public and benevolent is charitable, if the will shows the gift to have been inspired

by philanthropy and aimed at permanent good: *Pell v. Mercer*, 14 R. I. 412, 443. A gift to trustees to form a county "benevolent" fund, for the relief of the poor and distressed, widows and orphans, etc., has been held good as a charity: *Erskine v. Whitehead*, 84 Ind. 357.

Bequests to charities in general, or at large, have, in some cases, been held good: *Burr v. Smith*, 7 Vt. 241; 29 Am. Dec. 154. Contra, *Shields v. Jolly*, 1 Rich. Eq. 99; 42 Am. Dec. 349; *Webster v. Morris*, 66 Wis. 366; 57 Am. Rep. 278.

*Cemeteries.*—A cemetery corporation or association is a charity: *Hullman v. Honcomp*, 5 Ohio St. 238; and see *Wolford v. Crystal Lake Cemetery Assn.*, 54 Minn. 440. So, property held in trust by a Roman Catholic archbishop for the purposes of a cemetery is held for a charitable use: *Mannix v. Purcell*, 46 Ohio St. 102; 15 Am. St. Rep. 562; but the mere fact that a cemetery corporation voluntarily uses its funds for objects akin to the purposes of its organization, or, in other words, applies them to a considerable extent in charity does not make the corporation a public charity: *Donnelly v. Boston Catholic Cemetery*, 146 Mass. 163, 167. A trust to keep a cemetery or churchyard in proper order is a good charity because of the public benefit thereby conferred: *Webster v. Morris*, 66 Wis. 366; 57 Am. Rep. 278; *Sheldon v. Stockbridge*, 67 Vt. 299; *In re Vaughan*, 33 Ch. Div. 187; *Dexter v. Gardner*, 7 Allen, 243.

In England, there has been a difference of opinion upon the question whether the maintenance and repair of the tomb or monument of the donor, and keeping his grave beautified and in good order, is a good charitable use. Down to the time of the American Revolution, as by the civil law, it appears to have been held that it was: *Jones v. Habersham*, 107 U. S. 174, 183, citing early English cases; but according to the later English cases it is not: *In re Vaughan*, 33 Ch. Div. 187; *In re Birkett*, 9 Ch. Div. 576; *In re Williams*, 5 Ch. Div. 735; *Dawson v. Small*, L. R. 18 Eq. 114; *Fisk v. Attorney General*, L. R. 4 Eq. 521; *Hoare v. Osborne*, L. R. 1 Eq. 585; *Fowler v. Fowler*, 33 Beav. 616; *Rickard v. Robson*, 31 Beav. 244; *Lloyd v. Lloyd*, 2 Sim., N. S., 255. In this country a gift for the perpetual preservation of a private burying ground, or for the perpetual maintenance and repair of the tomb or monument of the donor, or his relatives, or for perpetually keeping his grave beautified and in good order, is not a charitable use: *Johnson v. Hollifield*, 79 Ala. 423; 58 Am. Rep. 596; *Hollifield v. Robinson*, 79 Ala. 419; *Coit v. Comstock*, 51 Conn. 352; 50 Am. Rep. 29; *Bates v. Bates*, 134 Mass. 110; 45 Am. Rep. 305; *Hornberger v. Hornberger*, 12 Heisk. 635; *Piper v. Moulton*, 72 Me. 155, practically overruling *Swasey v. American Bible Soc.*, 57 Me. 523, on this point; *Kelly v. Nichols*, 17 R. I. 306; 18 R. I. 62. Compare *Gafney v. Kenison*, 64 N. H. 354. In Connecticut, a bequest for the care of a burial lot is valid, but this is so by virtue of the statute which puts such bequests upon the same ground with public and charitable uses: *Bronson v. Strouse*, 57 Conn. 147. A devise for the erection of a monument over the graves of

the testator and his family is for a "humane purpose," within the meaning of a statute which declares that a devise for any "charitable or humane purpose" shall be valid: *Ford v. Ford*, 91 Ky. 572. But, while such purposes are not charitable, a devise or bequest in trust for the erection of a monument, or for the maintenance and repair of tombs, graves, and burial lots, etc., if not perpetual, and otherwise valid, may be sustained: *Green v. Hogan*, 153 Mass. 462. Compare note to *Rhymer's Appeal*, 39 Am. Rep. 738-741, on religious uses.

*Education.*—The support and promotion of education is an extensive field of charitable uses and trusts. All gifts for the promotion of education are charitable, in a legal sense, and trusts for this purpose are highly favored. Donations for the establishment and maintenance of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars, are charities in the sense of the common law: *Vidal v. Girard*, 2 How. 126; *Earle v. Wood*, 8 Cush. 445; *Gerke v. Purcell*, 25 Ohio St. 229; *Chapin v. School Dist.*, 35 N. H. 445. A devise to "a public seminary" is a valid charity: *Curling v. Curling*, 8 Dana, 38; 33 Am. Dec. 475. A public seminary designated as a general object of charity, by a testator, must be understood to mean either a seminary, or the seminary of his county, or any seminary which his executors or a court of equity, in the exercise of a sound discretion, may select, as best adapted to effect the object of the charity: *Curling v. Curling*, 8 Dana, 38; 33 Am. Dec. 475. A devise or bequest for the maintenance of universities, colleges, academies, and common schools, and other lawful educational institutions, is a charitable use, irrespective of the wealth or poverty of those who may be benefited therefrom; and donations or gifts for such maintenance, if good in other respects, will be sustained by a court of equity: *Franklin v. Armfield*, 2 Sneed, 305, 347; *Gerke v. Purcell*, 25 Ohio St. 229. A bequest to trustees to invest the same and apply the interest "toward the education of young students in the ministry of the German Lutheran Congregation," has been upheld as valid: *Witman v. Lex*, 17 Serg. & R. 88; 17 Am. Dec. 644. So, with a bequest providing for the creation of a fund for the education of "two young men, for all coming time" for the Christian ministry: *Field v. Drew Theological Seminary*, 41 Fed. Rep. 371. A devise to "The Vestry of Saint Mary's Church," at a place designated, for the maintenance of the parish school connected therewith is valid: *Hanson v. Little Sisters of the Poor*, 79 Md. 434. So, with a bequest on condition that the beneficiary shall be educated in the Roman Catholic faith: *Magee v. O'Neill*, 19 S. C. 170; 45 Am. Rep. 765. A devise and bequest for an institution named is valid: *Barnum v. Mayor*, 62 Md. 275; 50 Am. Rep. 219. Gifts for educational purposes embrace all trusts for the founding and support of schools, and other similar institutions, which are not strictly private; for the establishment of professorships and maintenance of teachers; for the education of designated classes of persons; and for the promotion of science and scientific studies: *Field v. Drew Theological Semin-*



ary, 41 Fed. Rep. 371, 373. Institutions of such a character, carried on for the benefit of the public, and not with a view to profit, are "institutions of purely public charity": *Gerke v. Purcell*, 25 Ohio St. 229; but a gift to an educational institution conducted for purposes of pecuniary profit would be void as a charity: *Stratton v. Physio-Medical College*, 149 Mass. 505; 14 Am. St. Rep. 442.

A trust for educational purposes is a good charitable trust, whether the benefits of the gift are confined to a particular locality or not: *Sears v. Chapman*, 158 Mass. 400; 35 Am. St. Rep. 502. That a trust for the education of children of a particular district or neighborhood is valid, see *Williams v. Pearson*, 38 Ala. 299; *State v. Griffith*, 2 Del. Ch. 392; *Newson v. Starke*, 46 Ga. 88; *Common Council v. State*, 5 Ind. 334; *Ex parte Lindley*, 32 Ind. 367; *Craig v. Secrist*, 54 Ind. 419; *Swasey v. American Bible Soc.*, 57 Me. 523; *Attorney General v. Briggs*, 164 Mass. 561; *Sappington v. Sappington*, etc. Trustees, 123 Mo. 32; *Stevens v. Shippen*, 28 N. J. Eq. 487; *McIntire v. Zanesville*, 17 Ohio St. 352; *State v. Smith*, 16 Lea, 662; *Hartshorne v. Nicholson*, 26 Beav. 58; *Dent v. Allcroft*, 30 Beav. 335. A devise or bequest for the education of a specific class of children of a particular county or state is valid; *Craig v. Secrist*, 54 Ind. 419; and so is a bequest to be "expended in the education of the scholars of poor people" in a certain county: *Clement v. Hyde*, 50 Vt. 716; 28 Am. Rep. 522.

The support of public or free schools, including the site for a schoolhouse, the erection of buildings, and the payment of teachers, is a charitable use or trust, and courts of equity will go a great length in supporting it: *Heuser v. Harris*, 42 Ill. 425; *Price v. School Directors*, 58 Ill. 452; *Andrews v. Andrews*, 110 Ill. 223; *Skinner v. Harrison Tp.*, 116 Ind. 139; *White v. South Parish*, 13 Met. 506; *Boxford Religious Soc. v. Harriman*, 125 Mass. 321; *Davis v. Barnstable*, 154 Mass. 224; *Sears v. Chapman*, 158 Mass. 400; 35 Am. St. Rep. 502; *Bartlett, Petitioner*, 163 Mass. 509; *Attorney General v. Briggs*, 164 Mass. 561; *Hatheway v. Sackett*, 32 Mich. 97; *Adams Female Academy v. Adams*, 65 N. H. 225; *Taylor v. Bryn Mawr College*, 34 N. J. Eq. 101; *Board v. Ladd*, 26 Ohio St. 210; *Raley v. Umatilla County*, 15 Or. 172; 3 Am. St. Rep. 142; *Martin v. McCord*, 5 Watts, 493; 30 Am. Dec. 342; *Wright v. Linn*, 9 Pa. St. 433; *Pickering v. Shotwell*, 10 Pa. St. 23; *McKissick v. Pickle*, 16 Pa. St. 140; *Barr v. Weld*, 24 Pa. St. 84; *Price v. Maxwell*, 28 Pa. St. 23; *McLain v. School Directors*, 51 Pa. St. 196; *Meeting St. etc. Soc. v. Hail*, 8 R. I. 234, 240; *Webster v. Wiggin*, 19 R. I. 73, 92; *State v. Smith*, 16 Lea, 662; *Bell County v. Alexander*, 22 Tex. 350; 73 Am. Dec. 268; *McDonough v. Murdoch*, 15 How. 367; *Perin v. Carey*, 24 How. 465; *Ingleby v. Dobson*, 4 Russ. 342; *Johnston v. Swann*, 3 Madd. 457; *Dent v. Allcroft*, 30 Beav. 335. A devise for the purpose of maintaining a school where no book of instruction is to be used, except spelling books and the Bible, is valid: *Tainter v. Clark*, 5 Allen, 66. A bequest to maintain a public school is not rendered invalid by the fact that the state has provided for the maintenance of public schools in all school districts within the state: *In re John's*

**Will, 30 Or. 494.** That a trust fund may be devoted to the payment of salaries of additional teachers in certain public schools, see *Webster v. Wiggin*, 19 R. I. 73, 92. A gift to a school does not cease to be for charitable uses, because religious instruction is combined in such school with that of a literary and scientific character, nor because its benefits are enjoyed alike by the rich and the poor: *Price v. Maxwell*, 28 Pa. St. 23. Hence, equity will uphold a donation for an educational purpose that is connected with a church: *Andrews v. Andrews*, 110 Ill. 223; *Newcomb v. St. Peter's Church*, 2 Sand. Ch. 636. A denominational school property, vested in trustees, for the purpose of affording encouragement to the education of youth, is a purely public charity, although the school is not open in the same way to the general public as to persons connected with the religious denomination, but who are admitted, as vacancies occur, upon the same terms with other pupils: *Episcopal Academy v. Philadelphia*, 150 Pa. St. 565. Property held by a Roman Catholic archbishop in trust for the purposes of public religious worship, schools, orphan asylums, and cemeteries, is for uses that will be upheld by the courts: *Mannix v. Purcell*, 46 Ohio St. 102; 15 Am. St. Rep. 562. It is the use to which property is to be applied, and not the particular persons to be benefited, that determines whether a gift constitutes a charitable use or trust: *Raley v. Umatilla County*, 15 Or. 172; 3 Am. St. Rep. 142.

The founding and support of private institutions of learning, and the endowment of professorships and scholarships, are also charities, as gifts for this purpose are designed to promote the public good by the encouragement of learning, science, and the useful arts. Such donations, though made without any particular reference to the poor, are regarded as charities: *Saint Clara Female Academy v. Sullivan*, 116 Ill. 375; 56 Am. Rep. 776; *Curling v. Curling*, 8 Dana, 38; 33 Am. Dec. 475; *Barnum v. Mayor*, 62 Md. 275; 50 Am. Rep. 219; *American Academy etc. v. Harvard College*, 12 Gray, 582, 594; *Taylor v. Bryn Mawr College*, 34 N. J. Eq. 101; *Trustees v. Kellogg*, 16 N. Y. 83; *Cresson's Appeal*, 30 Pa. St. 437; *Dickson v. Montgomery*, 1 Swan, 348; *Franklin v. Armfield*, 2 Sneed, 305; *Dodge v. Williams*, 46 Wis. 70; *Russell v. Allen*, 5 Dill. 235; 107 U. S. 163; *Perin v. Carey*, 24 How. 465; *Yates v. University College*, L. R. 8 Ch. 454. Compare *People v. Fitch*, 154 N. Y. 14, 31, 33.

The general diffusion of knowledge and the advancement of education and learning are also charities: *American Academy etc. v. Harvard College*, 12 Gray, 582; *Lowell's case*, 22 Pick. 215; *Weber v. Bryant*, 161 Mass. 400; *State v. Academy of Science*, 13 Mo. App. 213; *Chapin v. School Dist.*, 35 N. H. 445; *Thompson v. Swoope*, 24 Pa. St. 474. A bequest to the Royal, or to the Royal Geographical, or to the Royal Humane Society, is a charitable legacy: *Beaumont v. Oliveira*, L. R. 6 Eq. 534. A bequest "for the diffusion of useful knowledge and instruction amongst the institutes, libraries, clubs, or meetings of the working classes, or manual laborers who earn their bread by the sweat of their brow," etc., is a valid charity: *Sweeney v. Sampson*, 5 Ind. 465. So is a devise "for the distribu-

tion of good books among poor people in the back part of Pennsylvania": *Pickering v. Shotwell*, 10 Pa. St. 23. A gift "for the benefit, advancement, and propagation of education and learning, in every part of the world, as far as circumstances will permit," is a good charitable bequest: *Whicker v. Hume*, 14 Beav. 509. The Smithsonian Institution at Washington owes its existence to a bequest to found "an establishment for the increase and diffusion of knowledge among men," which Lord Langdale held to be a valid charity: *President v. Drummond* (M. S.), cited in *Whicker v. Hume*, 7 H. L. Cas. 155. A devise of property to be used in distributing over the land the publications of Henry George on the land question, and cognate subjects, will be sustained and enforced, though all such publications teach doctrines antagonistic to the law, in this—in teaching that the earth belongs to all mankind, and is an inalienable heritage, and that no private ownership can rightfully exist therein: *George v. Braddock*, 45 N. J. Eq. 757; 14 Am. St. Rep. 754.

The establishment and maintenance of institutions for the cultivation and promotion of art, or for education in the domestic and useful arts, is a charity: *Almy v. Jones*, 17 R. I. 265; *Webster v. Morris*, 66 Wis. 366; 57 Am. Rep. 278; *Cresson's Appeal*, 30 Pa. St. 437. A bequest to be used as premiums for medical essays is a good charitable bequest: *Palmer v. Union Bank*, 17 R. I. 627. So is one that provides medals for meritorious scholars in the High and Grammar Schools: *Bartlett, Petitioner*, 163 Mass. 509. A gift for the advancement of agricultural or horticultural knowledge is a valid charity: *Rotch v. Emerson*, 105 Mass. 431; and so is a donation for the education of deaf and dumb persons: *American Asylum v. Phoenix Bank*, 4 Conn. 172; 10 Am. Dec. 112. Equity will uphold, as a valid charity, a bequest for instruction in music and drawing, or a bequest for teaching young mariners the art or science of navigation: *Bartlett, Petitioner*, 163 Mass. 509. The education of the poor is a charity: *Hinckley's Estate*, 58 Cal. 457, 468; *White v. McKeon*, 92 Ga. 343; *Williams v. Pearson*, 38 Ala. 299; *Clement v. Hyde*, 50 Vt. 716; 28 Am. Rep. 522; *Leeds v. Shaw*, 82 Ky. 79.

The establishment and maintenance of a library for the benefit of the public is also a charity: *Crerar v. Williams*, 145 Ill. 625-643; *Bartlett, Petitioner*, 163 Mass. 509; *St. Paul's Church v. Attorney General*, 164 Mass. 188; *Drury v. Inhabitants of Natick*, 10 Allen, 169; *Dascomb v. Marston*, 80 Me. 223; *Maynard v. Woodard*, 36 Mich. 423; *Brown v. Pancoast*, 34 N. J. Eq. 321; *Donohugh's Appeal*, 86 Pa. St. 306; *Pepper's Estate*, 154 Pa. St. 331; *Manners v. Philadelphia Library Co.*, 93 Pa. St. 165; 39 Am. Rep. 744; *Attorney General v. Marchant*, L. R. 3 Eq. 424. This principle applies to public school libraries: *Maynard v. Woodard*, 36 Mich. 423. A library open to the public is none the less a charity because a small fee is charged to those who take out books, and a deposit required for their return: *Donohugh's Appeal*, 86 Pa. St. 306. A bequest for a public library and for a protectory for boys is a charitable bequest: *Duggan v. Slocum*, 83 Fed. Rep. 244. A gift



is not, however, a charity, unless it is expressly, or by necessary implication, for the public benefit. A private museum, or a library, established by private subscription for the use of the subscribers merely, is not a charity: *Thompson v. Shakespear*, 1 De Gex, F. & J. 406, 408.

*Hospitals, Homes, etc.*—The founding and maintenance of hospitals and asylums of various kinds, and homes for destitute and friendless children, and the aged and infirm, constitute charitable uses or trusts, and bequests, devises, or other gifts for such purposes will be upheld in equity with a strong hand. Trusts for such purposes may be established and carried into effect, when, if not of a charitable nature, they could not be supported: *Henepin v. Brotherhood of Gethsemane*, 27 Minn. 460; 38 Am. Rep. 298; *Woodruff v. Marsh*, 63 Conn. 125; 38 Am. St. Rep. 346; *Coit v. Comstock*, 51 Conn. 352; 50 Am. Rep. 29; *Ould v. Washington Hospital*, 1 McAr. 541; 29 Am. Rep. 605; 95 U. S. 303; *Doughten v. Vandever*, 5 Del. Ch. 51; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432; 21 Am. Rep. 529; *Hayes v. Pratt*, 147 U. S. 557; *Jones v. Habersham*, 107 U. S. 174; *In re Pearsons*, 113 Cal. 577, 586; *Tappan's Appeal*, 52 Conn. 412; *State v. Blake*, 69 Conn. 64; *Germain v. Baltes*, 113 Ill. 29; *Board v. Dinwiddie*, 139 Ind. 128, 133, 140; *Phillips v. Harrow*, 93 Iowa, 92, 107; *Weeks v. Hobson*, 150 Mass. 377, 380; *Gooch v. Association*, 109 Mass. 558; *Odell v. Odell*, 10 Allen, 1, 4; *Barkley v. Donnelly*, 112 Mo. 561; *Attorney General v. Moore*, 19 N. J. Eq. 503; *Mayor v. Elliott*, 3 Rawle, 170; *In re Bridger* (1894), 1 Ch. 297; *In re Ovey*, 29 Ch. Div. 560; *Foy v. Foy*, 1 Cox, 163. That an asylum for orphans may be, and is usually regarded as, a charity, see *Cromle v. Louisville Orphans' Home Soc.*, 3 Bush, 365; *Board v. Dinwiddie*, 139 Ind. 128, 133, 140; *Attorney General v. Moore*, 19 N. J. Eq. 503; *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668. An orphan asylum and hospital may, however, be merely a secular charity: *Attorney General v. Moore*, 19 N. J. Eq. 503. In the case of *In re Pearsons*, 113 Cal. 577, 586, a remark is made that "No asylum receives orphans merely because they are orphans as a charity. Only the indigent are entitled to be so received"; but, as we understand the law, the charitable character of an institution is not changed by the fact that its benefits are enjoyed by the rich as well as the poor. It is the use, and not the particular persons to be benefited, which determines its character: *Price v. Maxwell*, 28 Pa. St. 23; *Franklin v. Armfield*, 2 Sneed, 305; *Raley v. Umatilla County*, 15 Or. 172; 3 Am. St. Rep. 142.

*Poor and Unfortunate.*—The relief of the poor and unfortunate is a prolific field of charity. Trusts for the benefit of the poor, aged, disabled, or otherwise unfortunate of a defined locality are valid charitable trusts: *Tappan's Appeal*, 52 Conn. 412; *Coit v. Comstock*, 51 Conn. 352; 50 Am. Rep. 29; *Camp v. Crocker*, 54 Conn. 21; *Conklin v. Davis*, 63 Conn. 377; *Strong's Appeal*, 68 Conn. 527; *Williams v. Pearson*, 38 Ala. 299; *Clement v. Hyde*, 50 Vt. 716; 28 Am. Rep. 522; *Suter v. Hilliard*, 132 Mass. 412; 42 Am. Rep. 444; *State v. Grif-*

fith, 2 Del. Ch. 392; *City Council v. Walton*, 77 Ga. 517; *Hunt v. Fowler*, 121 Ill. 269; *Prickett v. People*, 88 Ill. 115; *Heuser v. Harris*, 42 Ill. 425; *Phillips v. Harrow*, 93 Iowa, 92; *Dascomb v. Marston*, 80 Me. 223; *Swasey v. American Bible Soc.*, 57 Me. 523; *Howard v. American Peace Soc.*, 49 Me. 288; *Fellows v. Miner*, 119 Mass. 541; *Goodell v. Union Assn.*, 29 N. J. Eq. 32; *State v. Gerard*, 2 Ired. Eq. 210; *Scott v. Trustees*, 39 Ohio St. 153; *Urmey v. Wooden*, 1 Ohio St. 160; 59 Am. Dec. 615; *Nauman v. Weldman*, 182 Pa. St. 263; *Trim's Estate*, 168 Pa. St. 395; *Witman v. Lex*, 17 Serg. & R. 88; 17 Am. Dec. 644; *Derby v. Derby*, 4 R. I. 414; *Hornberger v. Hornberger*, 12 Helsk. 635; *Sheldon v. Stockbridge*, 67 Vt. 299; *Webster v. Morris*, 66 Wis. 366; 57 Am. Rep. 278; *Erschine v. Whitehead*, 84 Ind. 357. The benefit of widows and orphans is a charity: *Camp v. Crocker*, 54 Conn. 21; *De Bruler v. Ferguson*, 54 Ind. 549; *Jones v. Habersham*, 107 U. S. 174; *Perin v. Carey*, 24 How. 465; *Moore v. Moore*, 4 Dana, 354; 29 Am. Dec. 417; *Board v. Rogers*, 55 Ind. 297; *Thompson v. Corby*, 27 Beav. 649; *Powell v. Attorney General*, 3 Mer. 48; though they are in another land; *Peynado v. Peynado*, 82 Ky. 5; or in a specified locality: *Attorney General v. Comber*, 2 Sim. & St. 94; *Sohier v. Burr*, 127 Mass. 221; *Fink v. Fink*, 12 La. Ann. 301; *Beardsley v. Bridgeport*, 53 Conn. 489; 55 Am. Rep. 152. A benefit to spinsters or needy or unfortunate single women is also a charity: *Thompson v. Corby*, 27 Beav. 649; *Jones v. Habersham*, 107 U. S. 174; *Fellows v. Miner*, 119 Mass. 541; *Swasey v. American Bible Soc.*, 57 Me. 523.

A gift for the benefit of the poor in general is a valid charity: *Darcy v. Kelly*, 153 Mass. 433; *Bullard v. Chandler*, 149 Mass. 532; *Jackson v. Phillips*, 14 Allen, 539, 551; *State v. McDonogh*, 8 La. Ann. 171; *Suter v. Hilliard*, 132 Mass. 412; 42 Am. Rep. 444; *Nash v. Morley*, 5 Beav. 177; *Attorney General v. Clarke*, Amb. 422; *Everett v. Carr*, 59 Me. 325; *Derby v. Derby*, 4 R. I. 414. A gift for poor relations has been sustained as a good charity: *Gafney v. Kenlson*, 64 N. H. 354. Contra, *Kent v. Dunham*, 142 Mass. 216; 56 Am. Rep. 667. Compare *Ross v. Ross*, 25 Can. Sup. Ct. 307; and so has the relief of the poor of a church or a secret society: *Conklin v. Davis*, 63 Conn. 377; *Attorney General v. Old South Soc.*, 13 Allen, 474; *Duke v. Fuller*, 9 N. H. 536; 32 Am. Dec. 392. A bequest to buy bread for the poor of a church is charitable: *Witman v. Lex*, 17 Serg. & R. 88; 17 Am. Dec. 644; and so is a bequest to buy coal or fuel for them: *Bird v. Merkle*, 144 N. Y. 544; *Webb v. Neal*, 5 Allen, 575. A gift for some poor deserving Jewish family has been upheld as charitable: *Bronson v. Strouse*, 57 Conn. 147; and so with a fund for the relief of poor emigrants: *Chambers v. St. Louis*, 29 Mo. 543; or a bequest for "the benefit of disabled soldiers and seamen who served in the Union army in the late war of Rebellion in the United States, their widows and orphans": *Holmes v. Coates*, 159 Mass. 226. A gift for the benefit of poor churches is a valid charity: *McAlister v. Burgess*, 161 Mass. 269; and so of a gift for the benefit of "aged" persons: *In re Wall*, 42 Ch. Div. 510. There is an extended and important note appended to *Hesketh v. Murphy*, 35 N. J.

Eq. 23-30, showing instances of bequests to the poor which have been upheld as charities.

*Religion.*—Trusts for the support of public worship and religious instruction, or the spreading of religion at home or abroad, come within the rank of legal charities, and constitute an immense field: Jackson v. Phillips, 14 Allen, 539, 553; Miller v. Porter, 53 Pa. St. 292; Thompson v. Swoope, 24 Pa. St. 474; Frierson v. General Assembly, 7 Heisk. 683; Mills v. Davison, 54 N. J. Eq. 659; 55 Am. St. Rep. 594; Going v. Emery, 16 Pick. 107; 26 Am. Dec. 645; Cosgrove v. Cosgrove, 69 Conn. 416; American Tract Soc. v. Atwater, 30 Ohio St. 77; 27 Am. Rep. 422; Teele v. Bishop of Derry, 168 Mass. 341; 60 Am. St. Rep. 401; Mannix v. Purcell, 46 Ohio St. 102; 15 Am. St. Rep. 562; Hinckley's Estate, 58 Cal. 457, 468; Alden v. St. Peter's Parish, 158 Ill. 631.

A gift of land on which to erect a church, and bequests for the erection, maintenance, and repair of church buildings, constitute a legal charity: Grissom v. Hill, 17 Ark. 483; Hughes v. Daly, 49 Conn. 34; Tappan's Appeal, 52 Conn. 412; Curd v. Wallace, 7 Dana, 190; 32 Am. Dec. 85; Swasey v. American Bible Soc., 57 Me. 523; Halsey v. Convention, 75 Md. 275; Old South Soc. v. Crocker, 119 Mass. 1; 20 Am. Rep. 299; Morville v. Fowle, 144 Mass. 109; Bartlett, Petitioner, 163 Mass. 509; St. George's Church Soc. v. Branch, 120 Mo. 226; Wright v. Trustees, Hoff. Ch. 201; Reformed Protestant etc. Church v. Mott, 7 Paige, 77; 32 Am. Dec. 613; Wetmore v. Parker, 52 N. Y. 450, 457; Loughheed v. Dykeman's Baptist Church, 129 N. Y. 211; Beaver v. Filson, 8 Pa. St. 327; Shields v. Jolly, 1 Rich. Eq. 99; 42 Am. Dec. 349; Jones v. Habersham, 107 U. S. 174; Cresswell v. Cresswell, L. R. 6 Eq. 69; In re Palatine Estate Charity, 39 Ch. Div. 54. In the New York cases just cited the gift is sustained, apparently, on the same principles which govern devises and bequests for other purposes, and not on the ground that it is a charity. The word "charitable" in New York, is given only its usual and ordinary meaning: People v. Fitch, 154 N. Y. 14. A bequest to trustees of moneys to purchase a lot and build a chapel to forever be used for purposes of public worship, under the auspices of the Roman Catholic Church, is a gift for a public charitable use: Teele v. Bishop of Derry, 168 Mass. 341; 60 Am. St. Rep. 401. In Maryland, a legacy of money to a church corporation for the support of the rector of the church, and of the chapel connected therewith, and for the repair of the church, is a valid bequest, subject to the sanction of the legislature: Halsey v. Convention, 75 Md. 275.

A gift for the support of ecclesiastical denominations and organizations, and the promotion of various religious opinions are within the domain of charities: Alden v. St. Peter's Parish, 158 Ill. 631; First Universalist Soc. v. Fitch, 8 Gray, 421; App v. Lutheran Congregation, 6 Pa. St. 201; Seda v. Huble, 75 Iowa, 429; 9 Am. St. Rep. 495; In re Michel's Trust, 28 Beav. 39. Thus a gift to the sect of Christians called Friends or Quakers is a charity: Dexter v. Gardner, 7 Allen, 243; Earle v. Wood, 8 Cush. 430, 445; and funds devoted to the purposes of an association of Shakers are dedicated



to a pious use, and must, therefore, be held to be appropriated to a charitable use: *Gass v. Wilhite*, 2 Dana, 170; 26 Am. Dec. 446. A gift for "printing, publishing, and propagation of the sacred writings of the late Joanna Southcote," is a charitable trust: *Thornton v. Howe*, 31 Beav. 14; and a gift to help form a "Young Men's Christian Association" is good as a charity: *Goodell v. Union Assn.*, 29 N. J. Eq. 32. A gift to promote the views known as "Evangelical" is good as a charitable trust: *In re Hunter*, L. R. (1897) 2 Ch. 105, reversing the same case, L. R. (1897) 1 Ch. 518. A donation "to the poor and the service of God" is a good charitable gift: *In re Darling*, L. R. (1896) 1 Ch. 50. A gift to a particular religious society is a valid charity: *Magill v. Brown*, Bright, 346; *Price v. Maxwell*, 28 Pa. St. 23; *Attorney General v. Dublin*, 38 N. H. 459; *Attorney General v. Jolly*, 2 Strob. Eq. 379; *Johnson v. Mayne*, 4 Iowa, 180; *Attorney General v. Gould*, 28 Beav. 485; *Beatty v. Kurtz*, 2 Pet. 566; *Succession of Auch*, 39 La. Ann. 1043.

Funds bequeathed for the support of missions and missionary enterprises, whether domestic or foreign, are valid charitable trusts or uses: *Carter v. Balfour*, 19 Ala. 814; *In re Hewitt*, 94 Cal. 376; *American Bible Soc. v. Wetmore*, 17 Conn. 181; *Johnson v. Mayne*, 4 Iowa, 180; *Kinney v. Kinney*, 86 Ky. 610; *Bartlet v. King*, 12 Mass. 536; 7 Am. Dec. 99; *Sohier v. St. Paul's Church*, 12 Met. 250; *Fairbanks v. Lamson*, 99 Mass. 533; *Missionary Soc. v. Chapman*, 128 Mass. 265; *Hinckley v. Thatcher*, 139 Mass. 477; 52 Am. Rep. 719; *De Camp v. Dobbins*, 29 N. J. Eq. 36; *Domestic etc. Missionary Society's Appeal*, 30 Pa. St. 425; *Presbyterian Board v. Culp*, 151 Pa. St. 467; *Gibson v. M'Call*, 1 Rich. 174; *Shields v. Jolly*, 1 Rich. Eq. 99; 42 Am. Dec. 349; *Dickson v. Montgomery*, 1 Swan, 348; *Frierson v. General Assembly*, 7 Heisk. 683; *Missionary Soc. v. Calvert*, 32 Gratt. 357; *Burr v. Smith*, 7 Vt. 241; 29 Am. Dec. 154. *Contra*, *Bridges v. Pleasants*, 4 Ired. Eq. 26; 44 Am. Dec. 94. The courts of Virginia have never decided that bequests for religious uses were void, for that reason alone: *Protestant etc. Soc. v. Churchman*, 80 Va. 718. The spread and support of the gospel is also in the field of charitable uses or trusts, and donations or gifts to accomplish this purpose are valid charities: *In re Lea*, 34 Ch. Div. 528; *American Tract Soc. v. Atwater*, 30 Ohio St. 77; 27 Am. Rep. 422; *Attorney General v. Wallace*, 7 B. Mon. 611, 617; *Bartlet v. King*, 12 Mass. 536; 7 Am. Dec. 99; *Hinckley v. Thatcher*, 139 Mass. 477; 52 Am. Rep. 719; *Morville v. Fowle*, 144 Mass. 109.

The circulation of religious literature is a charity that will be upheld by a court of equity: *Simpson v. Welcome*, 72 Me. 496; 39 Am. Rep. 349; *Kelly v. Nichols*, 17 R. I. 306; 18 R. I. 62; *Shields v. Jolly*, 1 Rich. Eq. 99; 42 Am. Dec. 349; *Frierson v. General Assembly*, 7 Heisk. 683; and so will a devise or bequest for the education of theological students: *Witman v. Lex*, 17 Serg. & R. 88; 17 Am. Dec. 644; *Dickson v. Montgomery*, 1 Swan, 348; *Trustees v. Whitney*, 54 Conn. 342; *Mann v. Mullin*, 84 Pa. St. 297; *Swasey v. American Bible Soc.*, 57 Me. 523; *Protestant etc. Soc. v. Churchman*, 80 Va. 718. *Contra*, *McCord v. Ochiltree*, 8 Blackf. 15. A gift for

the maintenance of preaching is a valid charity: *Sowers v. Cyrenius*, 39 Ohio St. 29; 48 Am. Rep. 418; *Alden v. St. Peter's Parish*, 158 Ill. 631; *Andrews v. Andrews*, 110 Ill. 223; *Brown v. Kelsey*, 2 Cush. 243; *Trustees v. Beatty*, 28 N. J. Eq. 570; and equity will uphold, as a valid charity, a devise or bequest for the support of the clergy: *Williams v. Pearson*, 38 Ala. 299; *Bishop's Fund v. Eagle Bank*, 7 Conn. 476; *Alden v. St. Peter's Parish*, 158 Ill. 631; *Andrews v. Andrews*, 110 Ill. 223; *Johnson v. Mayne*, 4 Iowa, 180; *Bartlett, Petitioner*, 163 Mass. 509; *Attorney General v. Dublin*, 38 N. H. 459; *Holmes v. Mead*, 52 N. Y. 332; *Thompson v. Swoope*, 24 Pa. St. 474; *Fidelity Ins. Co's Appeal*, 99 Pa. St. 443; *Gibson v. McCall*, 1 Rich. 174. Property or its proceeds is devoted to a religious or charitable purpose where it is set apart entirely and exclusively for the benefit of traveling, supernumerary, superannuated, and worn-out preachers, their wives, widows, and orphans: *Methodist etc. Church v. Hinton*, 92 Tenn. 188, 193.

A bequest or gift of money or other property for the purpose of having masses said for the repose of the donor's soul has been held a valid gift in Canada and Ireland, and not void as a bequest for superstitious uses: *Elmsley v. Madden*, 18 Grant U. C. 386; *Read v. Hodgens*, 7 Irish Eq. 17. In England, masses for the dead are a superstitious use, forbidden by law and void: *Heath v. Chapman*, 2 Drew, 417; *West v. Shuttleworth*, 2 Mylne & K. 684; *Attorney General v. Fishmongers' Co.*, 2 Beav. 151; *In re Blundell's Trusts*, 30 Beav. 360. In this country there are no superstitious uses, and bequests for saying masses have been held valid, even if they contain no element of a charitable use: *Moran v. Moran*, Iowa, Dec., 1897; *Vanderveer v. McKane*, 25 Abb. N. C. 105. Contra, *O'Conner v. Gifford*, 117 N. Y. 275; but they have been pronounced a charitable use: *Seda v. Huble*, 75 Iowa, 429; 9 Am. St. Rep. 495; *Rhymer's Appeal*, 93 Pa. St. 142; 39 Am. Rep. 736; *Schouler, Petitioner*, 134 Mass. 426. Compare *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 420. In *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 53 Am. St. Rep. 48, it is held that a bequest by a testator, to a church, of a stated amount of money, to be used "in solemn masses for the repose of my soul," is invalid as a charitable use, because it does not confer a public benefit open to an indefinite number of persons.

Gifts or donations of money or other property for Sunday school purposes are charitable trusts or uses: *Bartlett, Petitioner*, 163 Mass. 509; *Morville v. Fowle*, 144 Mass. 109; *Fairbanks v. Lamson*, 99 Mass. 533; *Mason v. Trustees*, 27 N. J. Eq. 47; *Conklin v. Davis*, 63 Conn. 377; *Carter v. Green*, 3 Kay & J. 591; *Shields v. Jolly*, 1 Rich. Eq. 99; 42 Am. Dec. 349; *Eutaw etc. Baptist Church v. Shively*, 67 Md. 493; 1 Am. St. Rep. 412.

*Group of Other Charities.*—A work of public and general utility is a valid charity, such as the repair of bridges and highways: *Town of Hamden v. Rice*, 24 Conn. 350; *In re Hall's Charity*, 14 Beav. 115; the benefit and ornament of a town: *Faversham v. Ryder*, 18 Beav. 318; the improvement of a town: *Howse v. Chapman*, 4 Ves.

542; Attorney General v. Heells, 2 Sim. & St. 67; the supplying of a town with water; Jones v. Williams, Amb. 651; the erection of a townhouse for transacting town business: Coggeshall v. Pelton, 7 Johns. Ch. 292; 11 Am. Dec. 471; and the purchase of a fire engine for a town: Magill v. Brown, Bright. 348. The property of a company formed for extinguishing fires is held for charitable uses, and cannot be divided among the members: Bethlehem v. Perseverance Fire Co., 81 Pa. St. 445; Humane Fire Co's Appeal, 88 Pa. St. 389. A gift of real and personal property for a public park is a good public charitable gift: Bartlett, Petitioner, 163 Mass. 509, and gifts for the erection therein of a memorial monument or arch, and the construction of a children's playhouse and grounds, are valid charitable bequests, although the testator has directed that a bronze statue of himself with his name underneath, in large letters, shall be placed upon the memorial, and that a mural tablet shall be placed in the playhouse with an inscription to the effect that the house was erected by the testator and his wife in memory of their son: Smith's Estate, 181 Pa. St. 109. The drainage of public land seems to be a charitable use or trust: Henry County v. Winnebago Drainage Co., 52 Ill. 454. Gifts of personalty to public institutions are valid charities: Beaumont v. Oliveira, L. R. 6 Eq. 534. Contra, as to a devise of realty, in England; British Museum v. White, 2 Sim. & St. 594. The setting out of shade trees is a charity: Cresson's Appeal, 30 Pa. St. 437; and a bequest to be used in setting out ornamental trees in schoolhouse grounds or other public places, or on the waysides, is a good public charitable bequest: Bartlett, Petitioner, 163 Mass. 509. A devise for the reduction of the national debt, or a bequest for the benefit of the country, is valid: Newland v. Attorney General, 3 Mer. 684; Dickson v. United States, 125 Mass. 311; 28 Am. Rep. 230. A bequest for a volunteer corps, and a military organization, maintained by state appropriations and public subscriptions, are charities: In re Lord Stratheden, L. R. (1894) 3 Ch. 265; Philadelphia v. Keystone Battery, 169 Pa. St. 526.

The following are also valid charities: the promotion of peace: Tappan v. Deblois, 45 Me. 122; the care of dependent and neglected children: Pendleton v. Kinney, 65 Conn. 222; the furnishing of relief, in 1860, "to all poor emigrants and travelers coming to St. Louis on their way bona fide to settle in the west": Chambers v. St. Louis, 29 Mo. 543; the abolition of slavery, before slavery was abolished in the United States; Jackson v. Phillips, 14 Allen, 539; the suppression of the sale of intoxicating liquors: Farewell v. Farewell, 22 Ont. 573; Haines v. Allen, 78 Ind. 100; 41 Am. Rep. 555; the establishment of a life boat: Johnston v. Swann, 3 Madd. 457; the release of imprisoned debtors: Attorney General v. Painter Stainers Co., 2 Cox Eq. 51; but compare In re Prison Charities, L. R. 16 Eq. 129; the prevention of cruelty to animals: Armstrong v. Reeves, 25 Irish Law Rep. 325. A society for the suppression and abolition of vivisection is a charity: In re Foveaux (1895), 2 Ch. 501; Armstrong v. Reeves, 25 Irish Law Rep. 325; In re Douglas, 35 Ch. Div. 472. A home for lost dogs is a charity: In re Douglas, 35 Ch.



Div. 472; and so is the studying and effort to cure maladies of any quadrupeds or birds useful to man: *University of London v. Yarrow*, 1 De Gex & J. 78.

*Purposes not Charitable.*—The following purposes are not charitable. For example, a gift to keep a clock in repair: *Kelly v. Nichols*, 17 R. I. 306; a bequest to a Sunday school, to be used in making Christmas presents: *Goodell v. Union Assn.*, 29 N. J. Eq. 32; a gift for the encouragement of the sport of yachtracing, though it may be beneficial to the public: *In re Nottage* (1895), 2 Ch. 649; a devise of a rent charge, to be paid to churchwardens, to be laid out in the purchase of garments to be given to "six old and poor widows of the parish whom they should judge the properest objects to receive the same with preference to those who, not being disabled by infirmity or sickness, were most constant in their attendance on the public service of the church": *In re Ross' Charity* (1897), 2 Ch. 397; a devise of real estate to a bishop in trust for the use of his diocese: *In re McCauley*, 28 Ont. 610; a bequest to be "applied for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility": *Kendall v. Granger*, 5 Beav. 300; a bequest for a private museum: *Thomson v. Shakespear*, 1 De Gex, F. & J. 399; a bequest for the benefit and maintenance of the families of the testator's late workmen, at a certain place, and to enable them, or their children, to become apprenticed, or to emigrate abroad: *In re Cullimore's Trusts*, 23 Irish Law Rep. 18; or a devise to keep the testator's house open for the reception of ministers and others of his faith when "traveling in the service of truth": *Kelly v. Nichols*, 17 R. I. 306; 18 R. I. 62. A devise to a pastor of a church will not be deemed charitable merely from the nature of the professional character of the devisee. In the absence of any evidence tending to fasten upon him a trust for either religious or charitable purposes, he is entitled to such gift in his own right: *Hodnett's Estate*, 154 Pa. St. 485; 35 Am. St. Rep. 851.

A gift to secure a change in existing laws is not a valid charitable trust. Thus, a bequest to trustees "to secure the passage of laws granting women, whether married or unmarried, the right to vote, to hold office, to hold, manage, and devise property, and all other civil rights enjoyed by men" is not a charity: *Jackson v. Phillips*, 14 Allen, 539. Compare *George v. Braddock*, 45 N. J. Eq. 757; 14 Am. St. Rep. 754, holding that the courts will permit the enforcement of a testamentary use which is designed to circulate works calling in question fundamental rules and establishments of the law, and agitating the question whether such law has, or has not, any better foundation than wrong and injustice. This case reversed *Hutchins v. George*, 44 N. J. Eq. 124, which held that a bequest for the distribution of books, in which the author described the system by which the landowners of the country hold the title to their lands as robbery, was not such a charity as the courts would enforce. If the tenets of books or publications include doctrines adverse to the foundation of all religion, or are subversive of all morality, a court will not sustain, as a charity, a devise or bequest

for their distribution: *Thornton v. Howe*, 31 Beav. 14; *George v. Braddock*, 45 N. J. Eq. 757; 14 Am. St. Rep. 754. On the other hand, it has been held that a bequest to promote the adoption of legislation totally prohibiting the manufacture, or sale, in the dominion of Canada, of intoxicating liquor to be used as a beverage, and to develop a strong public sentiment in favor of such legislation, is a valid charitable legacy: *Farewell v. Farewell*, 22 Ont. 573.

A bequest which would tend to create a revolution in a foreign country, is not a charitable legacy. This was so held respecting contributions for the political restoration of the Jews to Jerusalem: *Habershon v. Vardon*, 4 De Gex & S. 467. A bequest which tends to encourage offenses is opposed to public policy, and is not a charity, but void, as a bequest for purchasing the discharge of poachers, "committed to prison for the nonpayment of fines, fees, or expenses under the game laws": *Thrupp v. Collett*, 26 Beav. 125.

*Enforcement of Trust.*—The whole law as to the enforcement of charitable uses or trusts is concisely, clearly, and forcibly stated by Mr. Justice Gray, of the supreme court of the United States, in these words: "By the law of England from before the statute of 43 Elizabeth, chapter 4, and by the law of this country at the present day (except in those states in which it has been restricted by statute or judicial decision, as in Virginia, Maryland, and more recently in New York), trusts for public charitable purposes are upheld under circumstances under which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be so construed as to give them effect if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form or manner pointed out by him cannot be followed. They may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery; and an omission to name trustees, or the death or declination of the trustees named, will not defeat the trust, but the court will appoint new trustees in their stead": *Russell v. Allen*, 107 U. S. 163, 166. It has not been our purpose, however, to discuss, in this note, the validity or enforcement of charitable uses or trusts, but simply to show when a trust or use is charitable, and all discussions of any other question have been purposely omitted.

**GAGE HOTEL COMPANY v. UNION NATIONAL BANK.**

[171 ILLINOIS, 531.]

**BANKS—CHECKS—DISHONOR OF, IS UNAUTHORIZED WHEN.**—A bank is not authorized to refuse payment of a check to a bona fide holder, if the drawer's deposit is sufficient, although the drawer has ordered the bank not to pay the check.

**BANKS—CHECKS — DISHONOR OF — LIABILITY OF BANK.**—If a bank has sufficient funds of the drawer on deposit, with which to pay a check duly presented, it is liable to a bona fide holder for value, although payment is refused by direction of the drawer.

**BANKS—CHECKS—DISHONOR OF, BY DIRECTION OF DRAWER.**—The drawer of a check cannot stop payment of it after it has passed into the hands of a bona fide holder.

**BANKS—CHECKS—PRIVATE ARRANGEMENT AS TO PAYMENT—EFFECT OF.**—A private arrangement between a bank and one of its depositors not to apply a new deposit to the payment of a check previously drawn, does not exonerate the bank from its liability to pay such a check, if the amount of the drawer's old and new deposits are together sufficient to pay it.

**BANKS — CHECKS — DRAWING ON ANTICIPATED FUNDS—EFFECT OF.**—A depositor in a bank has a right to draw his check in the reasonable expectation that he will have sufficient funds, at the time of presentment, to meet it. Hence, inadequacy of funds, at the time the check is drawn, does not affect the holder's right to payment, if there are sufficient funds on hand when the check is presented.

Ashcraft & Gordon, for the appellant.

Tenney, McConnell, Coffeen & Harding, for the appellee.

**532** CARTWRIGHT, J. Henry C. Knill was a depositor in the bank of appellee, and on June 21, 1893, drew his check on appellee for three hundred dollars payable to the order of Leroy Payne, and delivered it to the payee. Payne on the same day indorsed the check and delivered it to appellant, who paid him three hundred dollars for it. Appellant deposited the check to the credit of its account with its bank, the Union Trust Company of Chicago, and the latter sent it through the clearinghouse, and it was presented to appellee for payment on June 23d. On the day the check was drawn the amount of Knill's deposit was ninety-eight dollars and fifty-three cents, but he made subsequent deposits, and when the check was presented he had on deposit with appellee funds in excess of the amount of the check. Appellee refused payment on the ground that Knill had ordered it not to pay the check, and the paying teller marked it "Payment stopped." On June 24th the dishonored check was returned to appellant by the Union Trust **533** Company, and appellant on



that day again presented it to appellee, which still had sufficient money to Knill's credit to pay it, but payment was again refused on the ground that it had been stopped by Knill. Thereupon the appellant brought this suit against appellee for the amount of the check. A jury was waived and the cause tried before the court, resulting in a finding and judgment for appellee. On appeal the judgment was affirmed by the appellate court for the first district, which has granted a certificate of importance, and the case has been brought to this court.

There is no dispute as to the material facts as above stated, and the rights of the parties depend upon the question whether appellee was justified in its refusal to pay the check because of the order of Knill that it should not be paid. This question is presented by the action of the court in refusing and modifying propositions of law presented at the trial.

The relation of the banker to the checkholder has been frequently considered by this court, and the right of the checkholder to payment on presentation of the check, provided there are sufficient funds on deposit to meet it, has been recognized and upheld in every case. This court has constantly held that when the check of a depositor is presented to the banker, if the deposit is sufficient to pay the check, it is an absolute appropriation of the amount of the check to the holder, and that the contract implied by law between the banker and his depositor for the benefit of whoever may become the holder of a check, is one upon which such holder can maintain an action. A different rule prevails in some other jurisdictions, but this one has been affirmed by many courts and leading textwriters as the logical one.

The case of *Munn v. Burch*, 25 Ill. 35, has been generally regarded as the leading case in this country stating the nature of the contract, and affirming the right of the checkholder to sue and recover from the bank for refusing <sup>534</sup> to honor a depositor's check under such circumstances. In that case, after stating the universal custom which enters into and forms a part of every contract between a banker and depositor, it was said (page 25): "This universal custom shows us what the contract of all the parties is. It shows us that the banker, when he receives the deposit, agrees with the depositor to pay it out, on the presentation of his checks, in such sums as those checks may call for and to the person presenting them, and with the whole world he agrees that whoever shall become the owner of such check shall, upon presentation, thereby become the owner and entitled

to receive the amount called for by the check, provided the drawer shall at that time have that amount on deposit. Who shall object to that portion of the contract which the law raises by implication on the part of the banker to the third person—to anybody and to everybody?” And it was further said: “We hold, then, that the check of a depositor upon his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for, which may again be transferred to another by delivery, and when presented to the banker he becomes the holder of the money to the use of the owner of the check, and is bound to account to him for that amount, provided the party drawing the check has funds to that amount on deposit, subject to his check at the time it is presented.”

In *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398, this court said (page 402): “The universal custom informs us what the contract of all the parties to such transactions is. It informs us that the banker, when he receives the deposit, agrees with the depositor to pay it out, on the presentation of his checks, in such sums as those checks may specify and to the person presenting them, and with the whole world the banker agrees that whoever shall become the owner of such check shall, upon presentation thereof, become thereby the owner and entitled to receive <sup>535</sup> the amount specified in the check, provided the drawer shall at that time have that amount on deposit.” The same doctrine has been affirmed in the following cases: *Bickford v. First Nat. Bank*, 42 Ill. 238; 89 Am. Dec. 436; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212; 22 Am. Rep. 185; *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483; *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634; 31 Am. St. Rep. 403; *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343. It is also the rule that the drawer of a check cannot stop payment of it after it has passed into the hands of a bona fide holder: *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212; 22 Am. Rep. 185.

These decisions are not controverted by appellee, but the argument in its behalf is, that after the check was given, Knill could make an arrangement with appellee that future deposits should not be applied to its payment. When the check was drawn the amount to Knill's credit was not sufficient to pay it, and after Knill had given the order not to pay it the bank received deposits before the presentation, which increased his balance to more than the amount of the check. It is insisted that Knill was free to make, and appellee to receive, deposits under an

arrangement that this check should not be paid. Of course, if Knill could make such an arrangement on June 21st as to further deposits, he, or any other depositor in a bank, could make a special contract, when opening an account, that only certain checks should be paid, or at any time limit the liability of the bank by a secret arrangement between himself and the bank as to checks that might be drawn in the future, in any manner that they saw fit. We think such a proposition plainly unsound, and in conflict with the decisions above referred to. If such a special agreement could be made, a person about to take a check could not rely upon the contract implied by the law, but would be compelled to go to the bank and ascertain whether the account had been opened under any special or private arrangement between the banker and depositor, or whether any instructions had <sup>536</sup> been given by the depositor as to what checks should be paid. Even if he should find that there was no agreement or instruction, and should take the check, he could not then rely upon the banker's contract to pay it if the funds were on deposit, since they might be checked out or withdrawn, and a new deposit made under an agreement or instruction that he should not be paid.

The basis of the decisions has been, that by universal custom there is a contract between the banker and depositor, created by the deposit and receipt of the money, with the whole world and for the benefit of every person who shall become the holder of a check. If the funds are in the bank when the check is drawn, the drawing is an appropriation, as between the drawer and the payee, of the sum of money named in the check, which is to lie in the bank until called for by a presentation of the check. It is true that in such a case there is no privity between the bank and the checkholder until presentment, and that priority in drawing a check does not give priority of right to the fund as against the banker, but that such priority of right is determined by the order of presentation. In *Munn v. Burch*, 25 Ill. 39, it was said: "Surely every sound lawyer will at once perceive a privity of contract between the banker and the holder of the check, created by the implied promise held out to the world, by the banker on the one side, and the receiving of the check for value, and presenting it, on the other. It is a familiar principle, of daily illustration, that a promise made to the public that the performance of a particular act shall entitle the person performing the act to a particular right is a valid assumpsit to such person. The promise on the one hand, and the performance on the



other, create a privity between the parties as intimate and as obligatory as if the promise had originally been made to the particular person." In Daniel on Negotiable Instruments, section 1638, the author says: "The objection to the checkholder's suing the bank on the ground that there is no privity <sup>537</sup> between him and the bank seems to us utterly untenable. It is true, there is no privity before the presentment of the check; but by that very act they are brought in privity and the checkholder's right to sue the bank completed."

Knill had a right to draw his check in the reasonable expectation that he would have funds, at the time of presentment, adequate to meet it, and he did have sufficient funds to his credit at the time of presentment. By giving the check he assumed the obligation that the funds should be there. Of course, he might have withdrawn his deposit before presentment, or have declined to make a further deposit to meet the check, and have thus committed a fraud upon appellant; but if he had done so it would have been his fraud, and not that of appellee, and appellee would have been in nowise responsible for it. It does not aid appellee that Knill might have committed a fraud in that way, so that appellant is no worse off than it would have been if he alone had committed the fraud. Its duty was to stand indifferent, and perform its obligation. When it accepted his account it did so with an agreement with the whole world that whoever should become the owner of his check should, upon presentation thereof, become the owner and entitled to receive the amount specified in the check—not as a matter of favor but as a matter of right—provided Knill at the time had the amount on deposit. This agreement was for the benefit of such checkholder, and we think no special contract could be made to abrogate it, without the consent of the checkholder. Appellant, in taking the check, had a right to rely upon the contract implied by the law, and was entitled to enforce it.

The judgments of the appellate court and circuit court are reversed and the cause is remanded to the circuit court.

Reversed and remanded.

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**BANKS—CHECKS—DISHONOR OF—ACTION.**—The drawing and delivery of a check upon a fund in a bank are, in effect, an assignment to the holder of the check of so much of the fund as the check calls for: *Niblack v. Park Nat. Bank*, 169 Ill. 517: 61 Am. St. Rep. 203; *Abt v. American etc. Bank*, 159 Ill. 467: 50 Am. St. Rep. 175; but the law is otherwise in New York, and some other states: See monographic note to *Sowden v. Craig*, 96 Am. Dec. 133, on the right of a holder of a check to sue. See, also, the cases collected in *Cincinnati etc. R. R. Co. v. Bank*, 54

Ohio St. 60; 56 Am. St. Rep. 700. In those states holding that a check is an assignment of the fund in bank to the holder, the payee may, after presentation for, and refusal of, payment, maintain an action against the bank to recover the amount of the check: Notes to Cincinnati etc. R. R. Co. v. Bank, 56 Am. St. Rep. 704; Whitehouse v. Whitehouse, 60 Am. St. Rep. 284. Under rulings that a check is not an assignment of the fund drawn upon, the holder cannot sue the bank upon a refusal to pay: Note to Sowden v. Craig, 96 Am. Dec. 133; Cincinnati etc. R. R. Co. v. Bank, 54 Ohio St. 60; 56 Am. St. Rep. 700.

A CHECK IS REVOCABLE before its presentation for payment, unless the bank upon which it is drawn has accepted or certified it: Note to Hawes v. Blackwell, 22 Am. St. Rep. 876.

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## HUSTON v. TRIBBETTS.

[171 ILLINOIS, 547.]

**TAXES, ANNUAL—LIFE TENANT MUST PAY.**—A life tenant of lands must pay the annual taxes upon the property, as the benefits for which they are exacted are realized from year to year, and it is just that the owner of the life estate should pay them.

**TAXES—SPECIAL ASSESSMENT AND ORDINARY TAX—DISTINCTION.**—A special assessment for a local and permanent improvement, such as the construction of a large ditch for drainage purposes, though levied through the exercise of the taxing power, is not regarded as an annual or ordinary tax, but as an equivalent for benefits in the increased value of the property.

**TAXES—SPECIAL ASSESSMENT FOR PERMANENT IMPROVEMENT—WHO MUST PAY.**—A special assessment for a local and permanent improvement, such as the construction of a large ditch for drainage purposes, should be borne ratably by the life tenant and remainderman in proportion to the benefit accruing to each, where such improvement increases the value of the remainder; but a special assessment for an improvement of the temporary character should be borne by the life tenant.

Action brought by the appellant, Albert M. Huston, against Nancy Tribbetts, the appellee, to recover the amount of a special assessment.

A. G. Jones and Beach & Hodnett, for the appellant.

Blinn & Harris, for the appellee.

<sup>548</sup> CARTWRIGHT, J. Appellee has a life estate in a tract of land of one hundred and sixty acres, and appellant owns the remainder in fee. The land is worth eight thousand dollars, and in 1893 it was specially assessed for benefits in the construction of a <sup>549</sup> ditch forty feet wide and seven feet deep and five miles long, for purposes of drainage, to the amount of fifteen hundred dollars, payable in five annual installments, with interest on the

deferred payments. The installment due in May, 1895, was three hundred and forty-three dollars and nineteen cents. It was not paid, and the land was sold by the county collector. In November, 1895, appellant redeemed the land by paying the amount due, four hundred and twenty-nine dollars and thirty-four cents, and brought this suit against appellee, the owner of the life estate, to recover the sum so paid. Appellee pleaded the general issue, and filed a special plea as to all of appellant's demand except twenty-five dollars, in which she set out the facts and averred that the improvement for which the assessment was levied was a permanent one for the drainage and improvement of the land, which benefited and permanently enhanced the value of both the life estate and the remainder; that the only claim or cause of action of appellant was for contribution of such part as her life estate should pay towards discharging the said special assessment, and that her contributive share did not exceed the sum of twenty-five dollars. The court sustained a demurrer to this plea, to which ruling appellee excepted and elected to stand by the plea. A jury was waived and the cause was tried by the court upon a written stipulation of the facts, in which it was agreed that appellee, the owner of the life estate, was of the age of sixty-eight years, and that the drain constructed by the drainage commissioners, for which the assessment was levied, was and is a lasting and permanent improvement, permanently adding to the value of the life estate and the remainder. There were finding and judgment for appellant, which were reversed by the appellate court and the cause was remanded to the circuit court, with directions to ascertain appellee's just proportion of the assessment and to give judgment for no more.

No objection is made to the form of the judgment or the direction of the appellate court if the defense set up by the special plea was a good one, and for the purpose <sup>550</sup> of presenting that question to this court appellant obtained a certificate of importance from the appellate court. The question thus raised is submitted to this court by the briefs of the parties, and is the only question in the case.

It is not doubted that appellee, as the owner of the life estate, must pay the annual taxes assessed against the property. They are imposed as a yearly burden for the current benefits derived from the administration of the laws, the protection of property and the general welfare. Special assessments like this, although levied through the exercise of the taxing power, are not regarded as such ordinary taxes, but as an equivalent for benefits in the



increased value of the property: *Cooley on Taxation*, 416; *Canal Trustees v. Chicago*, 12 Ill. 403; *McLean v. Bloomington*, 106 Ill. 209; *Illinois Cent. R. R. Co. v. Decatur*, 126 Ill. 92. The benefits for which ordinary taxes are exacted are realized from year to year, and it is just that the owner of the life estate should pay them, but they rest upon entirely different grounds from a special assessment, where the improvement is a permanent benefit to the property and to the remainder. Where the whole estate is benefited by the discharge of an encumbrance it is to be apportioned ratably between the tenant for life and the remainderman: 4 *Kent's Commentaries*, 74; 6 *Am. & Eng. Ency. of Law*, 882. Upon that principle it is held that the life tenant and remainderman are chargeable with their several portions of special assessments beneficial to each: *Peck v. Sherwood*, 56 N. Y. 615; *Plympton v. Boston Dispensary*, 106 Mass. 546; *Cairns v. Chabert*, 3 Edw. Ch. 312.

The argument for appellant is grounded on the claim that a contrary rule was laid down in *Warren v. Warren*, 148 Ill. 641, and that it was there held that the life tenant must pay and discharge all special assessments. In that case Alva Warren by his will appointed his son, John H. Warren, trustee of his estate, and directed him to pay out <sup>551</sup> of the annual rents and interest the annual taxes and insurance and all reasonable repairs and improvements of the property, and of the annual income not used for said purposes one-third should belong to his wife, Eliza A. Warren, during her natural life. She had executed an acceptance of the provision so made for her by the will, and was bound by its terms. The question which arose was whether it was proper for the trustee to pay out of the annual rents and interest the amounts of certain special assessments levied upon the property of the estate for paving streets and putting in sewers. It was held that the paving of a street in front of a lot and putting down a sewer therein were "reasonable improvements," and properly paid for by the trustee under the will. Eliza A. Warren was not in as doweress, but the rule there stated in cases where dower has been assigned, quoted from *Peyton v. Jeffries*, 50 Ill. 143, that the widow must be "subjected to the charges, duties, and services to which the estate may be liable, in proportion, certainly, to her interest therein," does not conflict with the above authorities requiring an apportionment. We do not see any conflict between *Warren v. Warren*, 148 Ill. 641, and them. If an improvement for which a special assessment is levied is of such temporary character, requiring renewal from time to time, that

the life tenant may be said to reap substantially all the benefits, and the remainder is not enhanced in value, the life tenant should bear the expense; but where there is a permanent improvement increasing the value of the remainder there would be no justice in requiring the life tenant to pay for such increase of value.

The circuit court erred in sustaining the demurrer to the special plea, and the judgment of the appellate court will be affirmed.

Judgment affirmed.

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**TAXES.—SPECIAL ASSESSMENTS** are not regarded as ordinary taxes, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvement: *Notes to Board v. Ottawa*, 33 Am. St. Rep. 410; *Richards v. Commissioners*, 42 Am. St. Rep. 659; *Reinken v. Fuehring*, 130 Ind. 382; 30 Am. St. Rep. 247. Assessments may be levied to drain wet lands, if it will promote the public health: *Zigler v. Menges*, 121 Ind. 99; 16 Am. St. Rep. 357.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**INDIANA.**

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**BISHOP v. STATE.**

[149 INDIANA, 223.]

**CONSTITUTIONAL LAW, INTERPRETATION OF.**—Words or terms used in a constitution, which is dependent upon ratification by the people, must be understood in the sense most obvious to the common understanding at the time of its adoption.

**PUBLIC OFFICERS, DEPUTY POSTMASTER, WHO IS A.** The term “deputy postmaster” as used in that part of the constitution declaring that no person holding a lucrative office under the United States shall be eligible to a seat in the general assembly, provided that the office of deputy postmaster shall not be deemed lucrative where the compensation does not exceed ninety dollars per annum, includes all local postmasters.

**PUBLIC OFFICE, VACATING ONE BY ACCEPTING ANOTHER.**—Where two public offices are incompatible, the acceptance of a second ipso facto terminates the right to the first.

**PUBLIC OFFICE, ACCEPTANCE OF A SECOND, WHEN IRREVOCABLE.**—When an officer holding a public office accepts, and has been inducted into, a second office incompatible with the first, his title to the first terminates, and cannot be revived by his subsequent resignation of the second. After the first office becomes vacant, the former incumbent cannot be restored to it by his own act. The same rule applies whether the offices are incompatible or not, if the constitution forbids the same person to hold both at the same time.

**PUBLIC OFFICE, SAME PERSON HOLDING UNDER THE STATE AND NATIONAL GOVERNMENTS.**—If a state constitution declares that no person shall hold more than one lucrative office at the same time, a person holding a state office, who subsequently accepts office under the United States, thereby terminates his right to hold the state office, and may be ousted upon information in the name of the state.

**QUO WARRANTO—PLEADING MUST NEGATIVE AN EXCEPTION.**—In a proceeding to oust an officer under the state on the ground that he holds a lucrative office under the United States, if the constitution provides that such office shall not be deemed lucrative unless the salary exceeds ninety dollars per year, the information must show that the office in question does not come within the exception.



J. M. Smith and F. H. Snyder, for the appellant.

W. A. Ketcham, attorney general, D. E. Griner, and D. T. Taylor, for the appellee.

<sup>223</sup> JORDAN, J. This action was prosecuted in the lower court upon information in the name of the state, on the relation of the prosecuting attorney, for the purpose of ousting the appellant from the office of township trustee. A judgment of ouster was rendered, <sup>224</sup> from which appellant prosecutes this appeal. The errors assigned are: 1. That the court erred in overruling a demurrer to the information; 2. Error in sustaining a demurrer to the answer.

The information charges, substantially, that the defendant, Peter L. Bishop, at the November election of 1894, was elected township trustee of Bear creek township, in Jay county, Indiana, for a term of four years, and that on the sixth day of August, 1895, he duly qualified as such trustee, and entered upon the discharge of the duties of the office; that subsequently, on the ninth day of October, 1896, the defendant was duly appointed and commissioned, by the postoffice department of the United States, postmaster at the village of Bryant, in said county of Jay, for a term of four years, and duly qualified as such postmaster at said time, and entered upon the discharge of the duties thereof, and from said day on has continued to hold said office of postmaster, and discharge the duties thereof. By reason of his accepting and entering upon the discharge of the duties of postmaster at Bryant, it is charged that he forfeited and surrendered the office of township trustee, and the prayer is that he be ousted therefrom. The state bases its right to expel appellant from the office in question on section 9 of article 2 of the constitution, which is as follows:

"No person holding a lucrative office or appointment under the United States, or under this state, shall be eligible to a seat in the general assembly; nor shall any person hold more than one lucrative office at the same time, except as by this constitution expressly permitted; provided, that officers in the militia to which there is attached no annual salary, and the office of deputy postmaster, where the compensation does not exceed ninety dollars per annum, shall not be deemed lucrative; and provided, also, that counties <sup>225</sup> containing less than one thousand polls may confer the office of clerk, recorder and auditor, or any two of said offices, upon the same person": Const., sec. 9, art. 2.

The contention of counsel for appellee is that appellant, by

accepting the office of postmaster, when he was an incumbent of another lucrative office created by the laws of this state, violated the above provision of the constitution, prohibiting one from holding two lucrative offices; and it is claimed that by this unlawful act he ipso facto surrendered his right to longer hold the office of trustee, and the latter office thereby became vacant. This proposition counsel for appellant to an extent controvert, and they insist that the information is insufficient for its failure to negative the exception in section 9, which provides that the office of deputy postmaster, where the compensation does not exceed ninety dollars per annum, shall not be deemed lucrative. Their insistence is that the pleading, upon any view of the case, must affirmatively disclose that the postoffice in question does not fall within this exception. Counsel in their brief say: "When our constitution was constructed and created, there was one 'general postoffice at Washington, D. C.,' and the postmaster general was in charge and denominated 'postmaster,' and the different offices throughout the country were known, and, in fact, designated, as 'deputy postmasters' by the federal statute. This was true until 1876, when the postoffices were designated as first, second, third and fourth class, and the lower class only are appointed by the postmaster general. The others are appointed by the president. In this latter statute the word 'deputy' was dropped, and the offices classified as we have said."

<sup>226</sup> In support of their contention they argue that the term "deputy postmaster," as employed in the constitution, means and includes what is now generally denominated "postmaster," and if the state relies on the positive prohibition of the constitution, to oust appellant from the office of trustee, it must, at least, by proper averments show that the annual compensation of the postoffice accepted and held by him exceeded ninety dollars, and thereby place him beyond the exception. On the other hand, counsel for the state contend that the information is sufficient, and in support of their contention they say that at the time of the adoption of the constitution the various postoffices throughout the state were filled by officials denominated and known as "postmasters," and the term "deputy postmaster," as used in the constitution was understood and intended to apply only to a person who was an assistant or deputy of a local postmaster, and for whose acts the latter officer was liable. Therefore they contend that inasmuch as the appellant was a postmaster, and not a deputy postmaster, he in no manner can avail himself of the exception to the prohibition against holding at the same time more than one lucrative office.

We regret that counsel in this appeal have not given us the aid which they should, in our search for a solution of the controversy on the point involved. The inquiry, under the circumstances, is: What is the correct interpretation of the term "deputy postmaster" as employed in section 9 of article 2 of the constitution? The precise question, so far as we have been able to ascertain, has not heretofore been considered by this court. In the cases of *Foltz v. Kerlin*, 105 Ind. 221, 55 Am. Rep. 197, and *Wood v. State*, 130 Ind. 364, the interpretation of the term "deputy postmaster," as now involved, does not seem to have been presented nor considered.

<sup>227</sup> In order to discover the true sense of the term in question, and thereby determine if the exception in controversy can be of any avail to the appellant in this action, we may properly examine the postal laws of the United States passed by Congress prior to the constitutional convention of 1850, which framed our present fundamental law, and learn from such acts if the term "deputy postmaster" was employed therein, and what duties were assigned to such officer. An inspection of the several acts of Congress relative to the postal affairs of the national government passed between the years of 1789 and 1827 discloses that the term "deputy postmaster" was used therein, and in other acts subsequently passed, and that it was intended to, and did apply to the persons who were intrusted with the distribution of the United States mail at the various localities where it was delivered. The postmaster general was considered the executive head of the postoffice department, and those who served under him at the various towns and cities throughout the country were considered his deputies: See 1 U. S. Stats. 733; 4 U. S. Stats. 298. By the act of July 2, 1836, the president was authorized, with the advice and consent of the senate, to appoint a "deputy postmaster" for each postoffice where the commissions allowed amounted to one thousand dollars and over, for the year ending June 30, 1835: 5 U. S. Stats. 80. In the act of March 3, 1845, the term "deputy postmaster" is again used, and likewise in the act of March 1, 1847, wherein certain pay is directed to be allowed to "deputy postmasters" in lieu of commissions previously paid: 5 U. S. Stats. 732; 9 U. S. Stats. 147. By an act of March 3, 1847, the postmaster general is directed to establish a postoffice at Astoria, Oregon, and appoint a "deputy postmaster" to discharge the duties thereof: 9 U. S. <sup>228</sup> Stats. 189, 200. By the act of March 3, 1851, the postmaster general was directed to furnish stamps, etc., to all deputy postmasters: 9 U. S. Stats.



589. Section 6 of the act of March 3, 1853, provided certain regulations in regard to "deputy postmasters": 10 U. S. Stats. 249, 255. It is apparent, therefore, that the statutes of the United States, passed before and long after the adoption of our constitution, applied the term "deputy postmaster" to each and all persons who were incumbents of and discharged the duties of the postoffices established at the towns and cities throughout the nation. That these officials in a legal sense, to a certain extent, were each considered as the deputy to the postmaster general, is evident. In fact, in many of the decisions of the federal courts, the term "deputy postmaster" was applied to a person filling a postoffice, and such officer is said to be the deputy of the postmaster general: *Boody v. United States*, 1 Wood & M. 150; 3 Fed. Cas. 860; *Postmaster General v. Early*, 12 Wheat. 136; *United States v. Le Baron*, 19 How. 73; *Ware v. United States*, 4 Wall. 617, 625; *Postmaster General v. Furber*, 4 Mason, 333; 19 Fed. Cas. 1098. Many other cases may be found to the same effect, but those to which we have referred will suffice for the purpose which we have in view.

Turning to the proceedings of the constitutional convention leading up to the framing and adoption of the section in controversy, and it appears that, after several propositions were made to exempt postmasters where the office did not exceed a certain annual compensation, from the term "lucrative office," the matter of holding more than one lucrative office at the same time, was finally referred to the committee on revision and phraseology, embodied in the following sections:

"Sec. 6. No person holding any lucrative office <sup>229</sup> or appointment under the United States or this state, shall be eligible to a seat in either branch of the general assembly; provided, that offices in the militia, to which there is attached no annual salary, shall not be deemed lucrative."

"Section 1. No person shall hold more than one lucrative office at the same time except as in this constitution expressly permitted; provided, that counties containing less than one thousand polls may confer the office of clerk, and recorder and auditor, or any two of said offices upon one person; provided, however, that the office of postmaster, where the compensation does not exceed ninety dollars per annum shall not be deemed lucrative."

This committee, after giving the question consideration, seems to have consolidated these sections, and prefixed the word "deputy" to postmaster, and incorporated the whole into section

9 of article 2 of the constitution, in which form it was reported to the convention and finally adopted and ratified by the people: Convention Journal, 166, 167, 527 et seq. No reasonable doubt can exist but what the committee on phraseology considered the phrase "deputy postmaster" as the one technically correct and proper to be used, in view of the fact that the postal laws of the United States applied this term to the particular federal officer which the convention had under consideration, and which had been designated in the section referred to the committee as "postmaster." In the debates of the convention, on the question of making a person ineligible to hold more than one lucrative office the term "postmaster" was generally used. Mr. Owen, a member of the convention, speaking on the question in regard to excluding postmasters from holding offices created by the laws of the state, said: "I ask the gentlemen if there is a <sup>230</sup> single postmaster who receives but ninety dollars a year who is not obliged to do something else for a livelihood? . . . . It is not for the sake of the receipts of the office that the postmaster accepts the office, but for the accommodation of the neighborhood. It is wrong then, in my opinion, to deprive them of the right to be elected to the legislature": Debates on the Constitution, 1423, 1424. In the address to the people of the state, prepared by Mr. Owen, and unanimously concurred in by the convention, wherein, among other things, the principal changes made in the old constitution under the new one about to be submitted, were pointed out to the electors, is the following: "Postmasters, if their annual compensation be ninety dollars or less, but not otherwise, may be elected members of the legislature": Debates on the Constitution, 2042. This announcement or declaration to the electors of the state relative to the provisions of the constitution which was about to be submitted for their ratification, by the men who had just completed the work of molding and giving it form, certainly must be accepted as revealing what was understood by the term "deputy postmaster," as used in the section in controversy, and the particular officer to which the term was intended to be applied. It is a rule generally asserted that words or terms used in a constitution which is dependent upon a ratification by the people must be interpreted in a sense most obvious to the common understanding at the time of its adoption, in the belief that such was the sense or meaning designed: Cooley's Constitutional Limitations, 6th ed., 69, 73, 81. Guided by this principle, in the light of the contemporaneous facts and circumstances to which we have referred, and it is plain, we think,

that the term in question, according to the common understanding of both those who framed and those who ratified our constitution, <sup>231</sup> was understood and intended to mean the office of postmaster as now denominated, and consequently must be applied to such office. Therefore, if the annual salary or compensation of a postoffice in this state is not in excess of ninety dollars, in that event such office cannot be considered a lucrative one within the prohibition of section 9. But, where such compensation exceeds ninety dollars, the office must be held to be lucrative; and, under the positive mandate of the constitution, the incumbent thereof is debarred from holding any other lucrative office created by the constitution or laws of this state. The settled rule of the common law prohibits an incumbent of a public office from holding a second one incompatible with the first, and the acceptance of the second office will ipso facto, terminate his right or title to the first. The authorities affirm that the act of accepting, under such circumstances, the second office, operates as a surrender of the first; and when the officer has been once inducted, under his election or appointment, into the second office, his subsequent resignation of the latter can in no manner serve to restore his right or title to the first office, for it is evident that when a public office once becomes vacant, a former incumbent cannot be restored to it by his own act: *Yonkey v. State*, 27 Ind. 236; *Howard v. Shoemaker*, 35 Ind. 111; *Gosman v. State*, 106 Ind. 203, 208, and authorities there cited; *State v. Bus*, 135 Mo. 325; *People v. Common Council*, 77 N. Y. 503; 33 Am. Rep. 659; *State v. Goff*, 15 R. I. 505; 2 Am. St. Rep. 921; *Mechem on Public Officers*, secs. 420, 425, 426; *Throop on Public Officers*, secs. 30, 31; 19 Am. & Eng. Ency. of Law, 562u.

The question, however, with which we have to deal in this case, is not one relating to the holding of incompatible offices in defiance of the common law, but relates <sup>232</sup> to the holding of one incompatible with the inhibition of the constitution. The doctrine of the common law which we have mentioned, however, is in some respects applicable. The test to be applied is not whether the two offices held by the appellant are incompatible with each other, but are they lucrative ones within the meaning of the constitution. That the office of township trustee is lucrative is settled beyond controversy: *Creighton v. Piper*, 14 Ind. 182; *Foltz v. Kerlin*, 105 Ind. 221; 55 Am. Rep. 197. If the annual compensation of the postoffice accepted and held by the appellant is over ninety dollars it is manifest that it falls within the constitutional interdiction, and appellant, by accept-



ing it, at the time he was holding that of trustee, violated the fundamental law of the state, and his unlawful act in so doing would produce the same result or effect as does the acceptance by an officer of a second incompatible office under the rule of the common law to which we have heretofore referred. It could not be presumed that appellant intended to violate the constitution by accepting and holding the office of postmaster if it was beyond the exception in question, when he was the occupant of that of township trustee, and the result to be implied from his act in doing so, under such circumstances, would be that he intended completely to surrender and vacate the latter office, and the law would attribute such a surrender as the necessary consequences of the act: 19 Am. & Eng. Ency. of Law, 562b; Mechem on Public Offices, sec. 429; Dickson v. People, 17 Ill. 191; State v. Buttz, 9 S. C. 156; In re Corliss, 11 R. I. 638; 23 Am. Rep. 538; State v. De Gress, 53 Tex. 387; Davenport v. Mayor, 67 N. Y. 456; Hoglan v. Carpenter, 4 Bush, 89.

Assuming, therefore, that the annual compensation of the postoffice in controversy exceeds ninety dollars, <sup>233</sup> the act of the appellant in accepting it while the incumbent of the office of trustee, would operate as a surrender or resignation of the latter, and it would become vacant to the extent at least that the proper appointing authority could lawfully proceed to fill the vacancy. This rule, we think, is well affirmed by the authorities cited: Gosman v. State, 106 Ind. 208; Osborne v. State, 128 Ind. 129.

But counsel for appellant urge in consideration of the fact that appellant subsequently resigned the office of postmaster, as alleged in his answer, consequently this action cannot be maintained. This contention is not tenable. As we have previously said, where the first office is once surrendered or vacated by accepting a second in defiance of law, the officer cannot be restored to any right or title under the first by resigning the second. Counsel refer us, however, upon this question to the cases of Foltz v. Kerlin, 105 Ind. 221, 55 Am. Rep. 197, and De Turk v. Commonwealth, 129 Pa. St. 151, 15 Am. St. Rep. 705. In both of these cases the party was holding the office of postmaster when he accepted and was inducted into the office created by the laws of the state. As the laws of the state could exert no dominion over a federal officer, as an officer, it was therefore said in the first case to be inconceivable, under such circumstances, that the acceptance of an office created by the state could operate to vacate one held under the statutes of the United

States. In *Foltz v. Kerlin*, 105 Ind. 221, 55 Am. Rep. 197, Elliott, J., intimated that the incumbent of a postoffice when installed into that of township trustee, might surrender the office of postmaster and retain that of trustee, but expressly said that both could not be held in defiance of the constitution. In the appeal of *De Turk v. Commonwealth*, 129 Pa. St. 151, 15 Am. St. Rep. 705, in view of the fact that the officer was postmaster at the time he accepted the office of commissioner, under the laws <sup>234</sup> of the commonwealth of Pennsylvania, it was held that he might resign the former and retain the latter. The facts in these two cases, it will be seen, were just the reverse of those in the case at bar. The question as here presented does not in any manner involve the right of the courts of the state to oust the occupant of a federal office, for in this respect it must be conceded they are utterly powerless. Their right, however, to pass upon the title to an office of one who claims to hold it under the laws of their own jurisdiction, and expel him therefrom, whenever he has vacated it by his act of accepting a federal office, great or small, in violation of the state's constitution, cannot be successfully controverted. Likewise, a state court has the power, as held in *Foltz v. Kerlin*, 105 Ind. 221, 55 Am. Rep. 197, to oust one from an office existing under state laws, when at the time he accepted and was installed into the latter, he was also the incumbent of an office under the authority of the United States, and insists, under such circumstances, in holding both in defiance of the state's constitution.

Having reached the conclusions expressed on the foregoing propositions, we may next proceed to consider and determine the ultimate question: Is the information sufficient, in the absence of any averments, to show that the compensation of the postoffice in controversy exceeds ninety dollars per annum? We are of the opinion that this question must be answered in the negative. The action is apparently instituted under the second subdivision of section 1145 of Burns' Revised Statutes, 1894 (Rev. Stats. 1881, sec. 1131), which provides that: "An information may be filed, etc., whenever any public officer shall have done or suffered any act which, by the provisions of law shall work a forfeiture of his office." The information under this provision of the code must state facts sufficient to show clearly a forfeiture of the office in controversy: *Chambers v. State*, 127 Ind. 365.

<sup>235</sup> We have seen that the act upon which the state relies to operate as a forfeiture of the office in dispute was the acceptance by the appellant of a second lucrative office, that of postmaster,

contrary to the provisions of the constitution. But, as we have heretofore said, section 9 of article 2, which forbids the holding of more than one lucrative office, also makes an exception in favor of a postmaster where the compensation of his office is not in excess of ninety dollars per annum. In the absence of any averment to the contrary, a court would be compelled to presume that the office in question was within the exception reserved by the constitution. We are not authorized to presume that the positive command of the law has been violated by appellant, and that he must therefore be subjected to a judgment of ouster. At least, as a matter of pleading, the plaintiff was required to negative the exception made in favor of a postmaster whose annual compensation does not exceed ninety dollars: *Brutton v. State*, 4 Ind. 601, 602; *Shearer v. State*, 7 Blackf. 99; *Howe v. State*, 10 Ind. 423; *State v. Carpenter*, 20 Ind. 219; *Wiley v. State*, 52 Ind. 516; *Burke v. State*, 52 Ind. 522; *State v. Buckner*, 52 Ind. 278; *Meier v. State*, 57 Ind. 386; *Henderson v. State*, 60 Ind. 296; *O'Brien v. State*, 63 Ind. 242; *Stevenson v. State*, 65 Ind. 409; *Wharton's Criminal Law*, 7th ed., sec. 614; *Wharton's Criminal Pleading and Practice*, 9th ed., sec. 238 et seq.; *Wharton's Criminal Evidence*, 9th ed., sec. 128; *High on Extraordinary Legal Remedies*, sec. 591; *Bliss on Code Pleading*, sec. 202 et seq.; 1 *Greenleaf on Evidence*, 13th ed., sec. 79, and note; 1 *Chitty on Pleading*, 1867, 224; *Gould's Pleading*, c. 4, sec. 22; *Shipman on Pleading*, 33; *Stephen's Pleading* (Heard's ed.), 443.

From the small population of the town of Bryant, as disclosed by the last federal census, it may be inferred that its postoffice belongs to the fourth class, the annual <sup>236</sup> compensation of which, under the postal laws, seems to be fixed and adjusted quarterly by the postoffice department, and depends, to an extent, on the amount of business done at the office.

For the reason pointed out, the information must be held to be insufficient, and the court therefore erred in overruling the demurrer thereto. The answer of the appellant, which set up his resignation of the postoffice in question, was no defense to the action, and the demurrer to it was properly sustained.

The judgment is reversed, and the cause remanded to the lower court, with instructions to sustain the demurrer to the information, with leave to amend, and for further proceedings in accord with this opinion.

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CONSTITUTIONS—INTERPRETATION OF.—Words used in a constitution are to be interpreted with reference to the usage or



custom of the country at the time of its adoption: *De Camp v. Archibald*, 50 Ohio St. 618; 40 Am. St. Rep. 692, and note; *Fox v. McDonald*, 101 Ala. 51; 46 Am. St. Rep. 98.

**OFFICES—EFFECT OF HOLDING INCOMPATIBLE.**—The acceptance by an officeholder of another office, incompatible with the first, is ipso facto a vacation of the first office: *Stubbs v. Lee*, 64 Me. 195; 18 Am. Rep. 251; *People v. Common Council*, 77 N. Y. 503; 33 Am. Rep. 659; *State v. Goff*, 15 R. I. 505; 2 Am. St. Rep. 921. That such acceptance does not create a vacancy in the first office, but renders his right to hold it capable of being questioned if he attempts to hold both, see *De Turk v. Commonwealth*, 129 Pa. St. 151; 15 Am. St. Rep. 705. For instances of incompatibility, see the cases above cited, and the note to *De Turk v. Commonwealth*, 15 Am. St. Rep. 708; *Foltz v. Kerlin*, 105 Ind. 221; 55 Am. Rep. 197.

**OFFICES—EFFECT OF RESIGNATION.**—Where an officer has transmitted his written resignation of an office to, and it has been received by, the officer or authority appointed by law to receive it, to take immediate effect, he cannot withdraw it, and there is a vacancy to be filled by proper authority: *State v. Hauss*, 43 Ind. 105; 13 Am. Rep. 384. That a resignation must be accepted to take effect: *State v. Clayton*, 27 Kan. 442; 41 Am. Rep. 418. Constructive resignation may result from abandonment of an office, and thereafter it cannot be refilled by accidental, voluntary, or forcible reoccupancy by the former holder: *State v. Allen*, 21 Ind. 516; 83 Am. Dec. 367, and monographic note.

## **PETERSON v. NEW PITTSBURG COAL & COKE COMPANY.**

[149 INDIANA, 260.]

**NEGLIGENCE—PLEADING NEGATING KNOWLEDGE ON THE PART OF THE PLAINTIFF.**—If a servant sues his master for injuries claimed to have resulted from the unfitness of a fellow-servant, and from defects in the place where the work was carried on, rendering it unsafe, the complaint must show that the plaintiff was himself without knowledge of the incompetency of the fellow-servant, and of the defects in the place where he worked.

**MASTER AND SERVANT—KNOWLEDGE OF DANGERS.** A person of mature years taking employment in a service is presumed to assume the hazards thereof, and his master is not liable for a failure to instruct him, unless such master or his foreman knew, or had reason to believe, that the servant was ignorant of, or incapable of comprehending, the dangers of the service.

**NEGLIGENCE IN NOT FURNISHING APPLIANCES—PLEADINGS.**—An allegation in a complaint that the place in which a plaintiff was required to work was unsafe, and that a second or additional platform was not constructed around an elevator, is not sufficient, where it does not appear therefrom that it was practicable to maintain an additional platform, nor that the platform in use was not sufficient for all purposes in connection with the elevator.

George G. Reily, for the appellant.

John S. Bays, for the appellee.

**261** HACKNEY, J. This is the third appeal of this case: See *New Pittsburgh etc. Coke Co. v. Peterson*, 136 Ind. 398; 43 Am. St. Rep. 327; *New Pittsburgh etc. Coke Co. v. Peterson*, 14 Ind. App. 634. The lower court sustained the appellee's demurrer to each of the two paragraphs of amended complaint, and that ruling is here assigned as error. The sufficiency of the first paragraph only has been discussed by appellant's counsel, and will alone be considered. The facts alleged disclose that the appellant, an employé of the appellee, was engaged in cutting ice from the sprocket wheels of a coke elevator, that in doing so his feet rested partly upon one of the elevator buckets, and that while so engaged the machinery propelling the elevator was started, and he was thereby thrown upon the buckets and against other parts of the elevator and seriously injured.

The company conducted its business of mining, farming, merchandising, and operating coke ovens, through a general superintendent, who selected a foreman, with power to employ, direct, and discharge servants, for each of the departments of said business.

At the time of appellant's injury he was acting pursuant to directions from the foreman of the coke department, who was assisting in the work of removing **262** the ice from the elevator. In the two former appeals it was held that the foreman was a fellow-servant, and not a vice principal. Nothing is alleged in the complaint as again presented to us, which would give any other character to the service of the foreman at the time. An effort was made, however, to take the case out of the fellow-servant rule, by allegations that the superintendent and foreman were each unfit for the service in which they were engaged, by reason of their ignorance, respectively, of the duties of the positions in which the company employed them. Several delinquencies in duty were alleged against the foreman and the superintendent, such as the failure of the latter to be present at times, his omission to give particular instructions, by rule or otherwise, as to the time of starting the machinery, and the failure to instruct the appellant as to the dangers of appellee's machinery, and the failure of the former to see that the belt connecting the power with the elevator was thrown off during the work, or to see that the power was not applied, and in placing appellant in a place of danger.

The pleading is meager and doubtful, if not deficient, in allegations disclosing that any of such alleged delinquencies were the proximate cause of the injury; but a fatal deficiency in the

pleading was a failure to allege, directly or indirectly, that the appellant was ignorant of the delinquencies of said servants, or that he did not know that they were unfit for the service in which they were employed. That such allegation was indispensable, as showing that the risk had not been assumed, has been often decided: *Evansville etc. R. R. Co. v. Duel*, 134 Ind. 156, and cases there cited. See also *Pennsylvania Co. v. Congdon*, 134 Ind. 226; 39 Am. St. Rep. 251; *Ames v. Lake Shore etc. Ry. Co.*, 135 Ind. 363; *Ohio etc. Ry. Co. v. Dunn*, 138 Ind. 18; *Evansville etc.* <sup>263</sup> *R. R. Co. v. Tohill*, 143 Ind. 49; *Salem-Bedford Stone Co. v. Hobbs*, 144 Ind. 146.

It was alleged, also, that the place where the appellant was required to work was unsafe, in that a second or additional platform was not constructed about the elevator at the upper sprocket, upon which to stand while engaged in the work then in hand. It was not alleged that it was practicable to maintain an additional platform, nor that the platform occupied by the foreman while assisting in the work was not sufficient for all purposes, in connection with the elevator. Judging the sufficiency of the pleading, we may not supply by inferences or presumptions, the necessity or practicability of an appliance merely from an allegation of its absence.

The complaint, as to the question of an unsafe place to work, is defective for the additional reason that it is not alleged that the appellant was not aware of the defect and its dangers: See authorities above cited.

As to the alleged failure to instruct the appellant concerning the dangers of appellee's machinery, it was not made to appear that the appellee or the superintendent or the foreman knew, or had reason to believe, that the appellant was ignorant of or incapable of comprehending, the dangers connected with the use of the appellee's machinery, or that, from his age any duty to advise him could be implied. The ordinary rule is that when a person of mature years takes employment in a service, whatever the ordinary hazards, he must be presumed in the absence of allegations to the contrary, to possess knowledge and skill fitting him for the service.

It was not alleged that the appellee knew of latent dangers in the machinery, its use, or in the place to work, that appellant was ignorant of such dangers, and that the appellee failed to notify him. For anything <sup>264</sup> appearing in the complaint the allegation does not have reference to extraordinary hazards.



In our opinion, the complaint was bad, and the lower court did not err in sustaining the demurrer thereto.

The judgment is affirmed.

**MASTER AND SERVANT—ACTION AGAINST FORMER BY LATTER—PLEADING.**—To enable an employé to recover from his employer on account of injuries received by reason of defective places, machinery, appliances, or incompetent coemployés it is generally necessary to allege and prove that the employer was in fault, and that the employé was without fault, or to allege and prove facts from which such fault and want of fault may be inferred: *Pennsylvania Co. v. Congdon*, 134 Ind. 226; 39 Am. St. Rep. 231.

**MASTER AND SERVANT—ASSUMPTION OF RISKS—DUTY TO INSTRUCT.**—An employé will be deemed to have assumed all risks naturally and reasonably incident to his employment, and to have notice of all risks which, to a person of his experience and understanding are, or ought to be, open and obvious: *Wagner v. Jayne Chemical Co.*, 147 Pa. St. 475; 30 Am. St. Rep. 745, and note. And an employer is under no obligation to warn an employé of danger which is obvious, nor to instruct him in matters which he may fairly be supposed to thoroughly understand: *Ciriack v. Merchants' Woolen Co.*, 151 Mass. 152; 21 Am. St. Rep. 438.

**MASTER AND SERVANT — ACTION FOR INJURIES THROUGH DEFECTIVE APPLIANCES—BURDEN OF PROOF.** A servant must show that an injury is more naturally attributable to the master's negligence than to any other cause, in an action by him against the master to recover damages for an injury sustained by the master's failure to provide suitable machinery, instruments, means and appliances: *Griffin v. Boston etc. R. R. Co.*, 148 Mass. 143; 12 Am. St. Rep. 526.

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## FINLEY v. CATHCART.

[149 INDIANA, 470.]

**A JUDGMENT IN PARTITION** does not ordinarily settle questions of title, unless they have directly been put in issue by the pleadings, nor create a new title, nor affect after-acquired titles, but simply divides the premises into separate shares under the titles existing at the time of the partition. Such judgment is, however, as conclusive between the parties upon all the material issues in the cause which the court was called upon to examine, and which under the pleadings were tried and determined, as are judgments in other actions.

**PARTITION, JUDGMENT IN, EFFECT OF BETWEEN THE DEFENDANTS, WHEN ENTERED UPON DEFAULT.**—If a complaint in partition correctly states the title of the plaintiff and avers, as to the balance of the title, that it belongs to certain defendants, naming the shares of each, and the failing to answer, partition is made according to the allegations of the complaint, it is not conclusive as between the defendants. Either of them remains at liberty to prove, in a subsequent litigation, that before the commencement of the former action, he acquired the title of another defendant, though, by the judgment in partition, such interest was assigned to the latter to hold in severalty. There being no issues as between the defendants, any judgment which the court pronounced purporting to settle any title or claim between them was, to that extent, *coram non judice*, and therefore void.

Asa Elliott, for the appellant.

Harvey Morris, for the appellees.

<sup>471</sup> JORDAN, J. Appellant instituted this action to quiet title to certain described real estate situate in Washington county, Indiana. Appellees Daniel E. Cathcart and wife appeared to the action, and filed an answer in two paragraphs, the first being the general denial. The second set up facts whereby they sought to establish the defense of *res judicata* between the appellant and the appellee Daniel E. Cathcart, upon the question of title to the lands in dispute by reason of a judgment in an action for partition, wherein the appellant and said appellee were defendants, but were defaulted by reason of their failure to appear. Under the issues joined, the court made a special finding of facts, and stated its conclusion of law adversely to the appellant, and over her objections rendered a judgment against her as to the lands in controversy.

The material facts in the case, as found by the court, are as follows: In 1891, William Cathcart died, at Washington county, Indiana, intestate, the owner in fee simple of eighty acres of land, of which that described in the complaint was a part. He left surviving no widow, but seven children, including the appellant and appellee Daniel E. Cathcart. Appellant, after the death of her said father, appears to have intermarried with one Finley. By virtue of the death of their father, his lands descended to his children in equal parts, and they held the same as tenants in common. In 1892, two of the children conveyed their interest of two-sevenths to the appellant, and in 1893 appellee, Daniel E. Cathcart, by his deed of "general <sup>472</sup> warranty," conveyed his undivided one-seventh in the said tract of land to his sister, the appellant. This deed was delivered, but not recorded. Including the interest which appellant acquired by descent and that which was vested in her by the conveyances heretofore stated, she became invested with, and was the owner of an undivided four-sevenths of the real estate. Some time prior to September, 1896, William F. Cathcart, one of said children, conveyed his one-seventh to one Reyman, who, prior to September, 1896, conveyed the same jointly to Walter, William S., and Stephen S. Mabry. Prior then, to September 14, 1896, said tract of land was held undivided in common as follows: One-seventh by the Mabrys jointly, four-sevenths by appellant, one-seventh each by John M. and Minnie E. Cathcart, the two latter being son and daughter of said William Cathcart, deceased. On the

fourteenth day of September, 1896, the three Mabrys filed a petition for partition in the Washington circuit court, making the appellant, Mrs. Finley, John M. Cathcart, Minnie Cathcart, and the appellee, Daniel E. Cathcart, defendants thereto, claiming or alleging in their petition that they, the plaintiffs, each owned one-twenty-first interest in value in the lands, and that appellant, Phalicia A. Finley, owned three-sevenths, and appellee, Daniel E., John M., and Minnie Cathcart each owned one-seventh. All of the said defendants, being duly notified of the pendency of said action, failed to appear and were defaulted, and thereupon the court, on the petition in said proceeding, ordered that the land be partitioned as follows: One-seventh in value jointly to said petitioners, three-sevenths to the appellant, Mrs. Finley, and one-seventh to appellee, Daniel E., and one-seventh each to John M. and Minnie E. Cathcart. Commissioners were appointed by the court, and they partitioned the lands accordingly, <sup>473</sup> assigning to Daniel E. Cathcart, the appellee, one-seventh of the real estate, which is the same now in dispute. The partition so made was confirmed by the court. The court further finds "that plaintiff, but for said partition record, would own one-seventh in value more than was set off to her in severalty in said action."

In view of these facts, counsel for appellant contends that she is not precluded or estopped by the judgment of the court in the partition action from asserting title to the appellee's interest in the land through his deed of conveyance to her; while on the other hand, counsel for appellee earnestly insists, that as the statute relative to partition proceedings requires the rights and title of the parties to be stated in the petition, and as the petition filed by the Mabrys alleged that appellee's interest was one-seventh and appellant's three-sevenths, and as partition was made accordingly, and confirmed by the court, the question is *res judicata*, and appellant is now estopped by the judgment from asserting through her deed from appellee any claim against him to the one-seventh which had been vested in her by said conveyance prior to the commencement of the action for partition. Or, in other words, the insistence of counsel for appellee virtually is that upon the issues tendered alone by the petition of the plaintiffs in the partition action the court was authorized to order, as it did, under the averments of the petition, that the interests of the several defendants in the land, as therein alleged, be partitioned to each of them in severalty, and thereby conclusively settle, as between each of them, all their rights, title, and interests in and to the premises.



In order to determine the question at issue between the parties to this appeal, an examination of the statute concerning the partition of lands becomes essential, <sup>474</sup> as it certainly will be helpful in arriving at a correct solution of the controversy. Section 1200 of Burns' Revised Statutes, 1894 (Rev. Stats. 1881, sec. 1186), provides that, "Any person holding lands as joint tenant or tenant in common . . . . may compel partition thereof in the manner provided by this act." The section next following provides that, "Any such tenant may apply to the circuit court, . . . . by petition, setting forth a description of the premises and the titles therein of the parties interested." By the next section it is provided that the pleadings, proceedings, and practice shall be the same as in civil actions, except as otherwise provided in this act. Section 1203 of Burns' Revised Statutes, 1894, in part, reads as follows: "If upon the trial of any issue, or upon default, or by consent of parties, it shall appear that partition ought to be made, the court shall award an interlocutory judgment that partition be made to parties who may desire the same, specifying therein the share assigned to each, and taking into consideration advancements to heirs of a person dying intestate; and the residue of the premises shall remain for the persons entitled thereto, subject to a future partition." Section 1207 of Burns' Revised Statutes, 1894, provides that, "Two or more persons may, if they choose, have their shares set off together." It is evident that any person who comes within the provisions of section 1200, *supra*, when the land is susceptible of division without damage to the owners, may enforce partition, and is entitled to have his interest in the premises assigned to him in kind, and thereby have and hold the same in severalty. But it does not follow in such a case, when one or more cotenants, as was done in the partition action herein mentioned, petition the court for partition, making other alleged cotenants defendants, and where the latter are defaulted, and do not appear to answer the <sup>475</sup> petition, and no cross-complaint is filed by any of them tendering any issue between themselves, and they in no manner express to the court a desire or request to have their respective interests in the premises set off, that the court may, under such circumstances, proceed to order, upon the petition alone, that partition be made among such defendants, and assign to each the interests alleged in the petition, and thereby preclude said defendants, as between each other, as to all their rights, titles, and interests in and to the real estate which was the subject of partition. The language of section 1203 is, "If . . . . it shall

appear that partition ought to be made the court shall award an interlocutory judgment that partition be made to *parties who may desire the same*, . . . taking into consideration advancements . . . and the *residue of the premises* shall remain for the persons entitled thereto, *subject to future partition*." (The italics are our own.) In *Pipes v. Hobbs*, 83 Ind. 43, this court, in passing upon the sufficiency of a petition in a partition action, said, "The statute provides that 'the court shall award an interlocutory judgment that partition be made to parties who may desire the same, specifying therein the share assigned to each, . . . and the residue of the premises shall remain for the persons entitled thereto, subject to a future partition.' . . . The court needs to know the interest or shares so far as to be able to specify them in making the partition—the portions that are to be set off, each to the owner or owners thereof desiring partition, and the residue, which is not to be partitioned among its owners, must be known.

"When there are two or more defendants, and the complaint has described the premises and the plaintiff's right and title therein, showing the share which <sup>470</sup> he desires to have assigned to him by partition, it is a sufficient further compliance with the statute to set forth the rights and titles of the parties interested in the residue of the premises as one share owned by them all, leaving the parties entitled to such residue, each of whom should be best qualified to state his individual interest, to seek partition for themselves. If one of such defendants desire that his individual share be set off to him, he has an interest in having the record to indicate that share, and he may state it in his own pleading."

This decision seems to assert a correct rule, and supports us in holding, as we do, under the facts in this case, that it was not essential in the partition action instituted by the Mabrys, in order to award to them the right or relief to which they were entitled, for the court to so extend its order as to direct partition to be also made among the defendants, and order shares corresponding to those recited by the plaintiffs in their petition to be set off in severalty to each of said defendants. But, the court in the case in question having so ordered, and also confirmed the action of the commissioners, in assigning in severalty the alleged interests to the defendants, including appellant and the appellee, the question is, Can the appellee, who had divested himself of all interest in the land prior to the action in partition, shield himself behind such judgment, and thereby parry the

force and effect of his warranty deed, and succeed in virtually wresting the land from the appellant for his own benefit? It has been repeatedly held by this court that ordinarily a judgment in partition does not settle questions of title unless the same have been directly put in issue by the pleadings; or, in other words, the judgment does not create a new title, nor affect after-acquired titles, but simply divides the premises into separate <sup>477</sup> shares under the titles existing at the time of partition. This seems to be the doctrine asserted in *Miller v. Noble*, 86 Ind. 527; *Elston v. Piggott*, 94 Ind. 14; *Habig v. Dodge*, 127 Ind. 31: See *Black on Judgments*, secs. 660, 661. Ordinarily the presumption is that title is not in issue in a partition proceeding: *Green v. Brown*, 146 Ind. 1.

But it must be accepted as a well-affirmed principle of law that a judgment or decree in a partition suit, when the court has jurisdiction over the parties and the subject matter, is as conclusive between the parties upon all the material issues in the case which the court was called upon to examine, and which, under the pleadings, were tried and determined, as are judgments in other actions: *Freeman on Cotenancy*, sec. 530; *Isbell v. Stewart*, 125 Ind. 112; *Habig v. Dodge*, 127 Ind. 31; *Freeman on Judgments*, sec. 304; *Black on Judgments*, secs. 660, 661. In fact, it is an essential element or principle underlying the doctrine of former adjudication that the judgment in the former action settles all material issues involved between the parties to that action, and all matters which might have been properly litigated and determined within the issues made or tendered by the pleadings in the case, and to this extent the judgment is not subject to a collateral attack: 1 *Van Fleet's Former Adjudication*, 2; *Faught v. Faught*, 98 Ind. 470. This is the rule asserted and adhered to by this court from *Fischli v. Fischli*, 1 Blackf. 360, 12 Am. Dec. 251, down to the present time, and this principle is applicable to final judgments in partition the same as it is to those in other actions: *Watson v. Camper*, 119 Ind. 60. The court or jury trying the cause, however, cannot, in any case, legitimately go outside of the issues under the pleadings, and determine matters not embraced within such issues; and what was not within the latter, although they <sup>478</sup> might have been extended to include it, will not, at least, be presumed to have been conclusively adjudicated: *Griffin v. Wallace*, 66 Ind. 410, and cases there cited. It is affirmed in *Jones v. Vert*, 121 Ind. 140, 16 Am. St. Rep. 379, that a party, to successfully invoke the doctrine of former adjudication, must



be one who, in the former action, tendered to the party against whom he invokes it an issue to which the latter could have demurred or pleaded; and, where two or more defendants make an issue with the plaintiff, a judgment determining that issue in favor of the defendant does not settle the question between codefendants. In the case last cited the action was instituted to foreclose a vendor's lien. The defendants sought to avail themselves of the defense of former adjudication, and alleged in their answer that in a former suit prosecuted by one Sterne to foreclose a mortgage, to which action the plaintiff and defendants were party defendants, the former had set up the lien then in controversy, and the court rendered its judgment against Sterne, the plaintiff, and quieted the title of the defendants to the real estate described in the complaint. It was held that these facts fell far short of constituting a good defense. The court, in passing upon the question, in the course of its opinion, per Mitchell, J., said: "The defendants in the foreclosure suit might possibly have put the validity of the vendor's lien in issue by filing a cross-complaint: *Woolery v. Grayson*, 110 Ind. 149. This does not appear to have been done, and we cannot presume that it was. There does not seem to have been any issue tendered or made, between the defendants. In short, there does not appear to have been any suit pending between them. Any judgment, therefore, that the court may have pronounced, which purported to settle any title or claim, between the defendants, was coram non judice, and void: *McFadden v. Ross*, 108 Ind. 512; *Griffin v. Wallace*, 66 Ind. 410."

479 It is asserted in *Wilbridge v. Case*, 2 Ind. 36, that "without an issue, nothing is tried, and, of course, nothing determined, and a judgment in such case should bind neither party." Unless it can be said that the issue raised alone by the petition in the partition suit was sufficient to warrant the court in determining the question of title between appellant and appellees then there was no other issue, as we have seen, under which it could have been decided.

The facts necessary to constitute a cause of action in favor of the Mabrys, and entitle them, under the statute, to a partition of their alleged moiety, it would seem, were that they held and owned the same in the lands described in their petition, undivided, as tenants in common with the defendants. These appear to have been the only material issues which were tendered by the petition to the defendants. All such matters, and all others coming within the material issues in the case, as between the plaintiffs

and defendants, must be held to have been settled by the judgment, and as to such matters it would not be open to collateral attack. But it cannot, in reason, be said that the issue so raised by the petition must be presumed and held to have conclusively settled all matters between the defendants. As it appears, none of the defendants filed a cross-complaint, nor in any manner appeared to the action, and requested partition of their interests, and in reality no issue was raised in any way by the defendants as between each other. It is evident, therefore, under such circumstances, in the light of the authorities, that it can be said that the court was not called upon, nor was it relevant for it, to examine into and determine matters of an adverse nature existing between any of the defendants. While it may be conceded that under section 386 of Burns' Revised Statutes, 1894 (Rev. Stats. 1881, sec. 383), the defendants, by their default <sup>480</sup> in question, as between them and Mabrys, the plaintiffs, must be deemed to have admitted all the material and traversable averments constituting the cause of action. That such is ordinarily the result of a defendant's default, has been repeatedly decided by this court. But surely the rule cannot be extended so as to justify a holding that appellant, by her default, admitted that she was seised of an interest in the realty of three-sevenths only, and appellee, her codefendant, of one-seventh. In fact, we fail to recognize any features or provisions in the partition statute which can be said, on the default of the defendants in the action instituted by the Mabrys, to have put in issue, ipso facto, any title or interest between any of said defendants, so as to warrant the court by its judgment to conclusively adjudicate the same. Decisions of other states, to which we have been referred, were in partition proceedings based upon statutes quite different from our own, and therefore are not influential on the question here involved. The case of *Forder v. Davis*, 38 Mo. 107, in no manner lends support to appellees' contention. The facts in that case were dissimilar from those in this appeal, and the statute under which the partition there involved was made differed, in an essential respect, from our own. It is true, the Missouri statute required the petition to set forth the titles of all the parties interested in the lands, but it also required the court to declare the interests of the defendants in the realty, as well as that of the petitioner, and it made such judgment binding and conclusive as to all parties to the proceedings.

It may be correctly said that the Mabrys by their petition for partition, challenged the defendants, one and all, to set up

and avail themselves of any title or matter which would defeat the former in their demands for partition, or which would diminish the <sup>481</sup> interest which they claimed to have and hold in the real estate; but certainly it cannot be successfully urged that the petition also required or compelled the appellant to present and litigate all matters, rights, and titles as between herself and appellee, and, having failed to do so, she must now, under the circumstances, be held to be precluded by the court's judgment in ordering and confirming partition among the defendants. The contention that, under the facts, such must be the result, in our opinion is destitute of any reasonable support. To affirm such a rule would not only, as we believe, operate mischievously in the future, but would manifestly work an injustice in the case at bar. That defendants in a partition proceeding may, between themselves, by a cross-complaint, settle all legal or equitable rights and titles is well settled: *Martindale v. Alexander*, 26 Ind. 104; 89 Am. Dec. 458; *Milligan v. Poole*, 35 Ind. 64; *Ferris v. Reed*, 87 Ind. 123.

Without further extending this opinion, we are constrained to hold that the petition filed by the Mabrys for partition did not put in issue, between appellant and appellees, the title which the former held by the deed from the latter, and therefore, she is not precluded or estopped by the judgment from asserting, as against appellees, her title to the land in dispute through said deed. We must not be understood as holding that, had appellant, under the circumstances, been satisfied with the share assigned to her, and had accepted and acquiesced in such partition, she would not have thereby confirmed the same, and made it effectual between her and the appellee, nor as to what would be her situation were this controversy between her and an innocent purchaser for value from appellee. These questions are not involved, and therefore not decided.

<sup>482</sup> It follows that the court erred in its conclusion of law, and the judgment is reversed, and the cause remanded to the lower court, with instructions to restate its conclusion in favor of appellant, and render its judgment quieting her title to the lands in question.

#### ON PETITION FOR REHEARING.

PER CURIAM. The appellee in this cause has filed what purports to be a petition for a rehearing. It wholly fails to respond to the requirements of rule thirty-seven of this court, for the reason that it is nothing more than a general statement to the effect that the judgment of the court on the former hearing was erroneous. In fact, the paper which is denominated a "petition"



is but an extended argument wherein the appellee reiterates, and attempts more fully to support the reasons given in his original brief, in opposition to a reversal of the judgment of the lower court. A petition for a rehearing, in this court, is a pleading, and should not be an argument; and in order that it may conform to the rule of appellate practice, <sup>490</sup> as it seems to be settled by repeated adjudications of this court, it must state specifically the errors which the petitioner considers the court committed in the result reached in the former hearing, and general statements, or assertions, that the decision is erroneous, will not suffice. An applicant for a rehearing should include in his petition all the grounds upon which he bases his claim for a rehearing, and those not included therein, will be deemed by the court to have been waived, and will not be considered. The alleged petition herein, for the reasons which we have stated, does not comply with the rule as required, and consequently presents no question for review. It is therefore overruled.

CHIEF JUSTICE HOWARD dissented. He said that the plaintiff occupied an inconsistent position, and that she claimed as hers eleven acres of land which, in the partition suit, were set off by metes and bounds to her brother Daniel. He insisted that the record in the partition suit showed that the title held by each of the parties was in issue, because the complaint alleged that the appellant was the owner of three-sevenths of the property, and that her brother Daniel was the owner of one-seventh, whereas she now claimed that she was the owner of four-sevenths, and he was not the owner of any interest whatever, and that whatever ownership she then had in the land was in issue and before the court for determination, and that the court, having adjudged that she was the owner of three-sevenths only in value and set aside that portion to be held in severalty, the judgment was conclusive, and her only remedy was by some proceeding to correct that judgment. He admitted that the particular nature and duration of title were not in every case an issue in a partition suit, that the judgment, in such suit, operated only upon the title held at the time it was instituted, and not upon any after-acquired title, citing *Freeman on Cotenancy*, sec. 533; *Kitts v. Willson*, 140 Ind. 604. It was not, he said, however, contended in the present case that the appellant held any title in addition to that held by her when the suit in partition was commenced, and he cited various Indiana cases holding judgments in partition to be conclusive, including *Isbell v. Stewart*, 125 Ind. 112; *Brown v. Grepe*, 135 Ind. 4; *Irvin v. Buckles*, 148 Ind. 389; *Wright v. Nipple*, 92 Ind. 310.

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PARTITION — EFFECT OF JUDGMENT IN — CONCLUSIVE-  
NESS.—At common law the effect of a judgment in partition was only to vest in each party a sole seisin in his allotment, and ascertain and affirm the possession of the cotenants as between themselves: Extended note to *Nicely v. Boyles*, 40 Am. Dec. 640. The

office of such a decree is not to transfer title of lands from the decedent to his heirs, but merely to divide what descends to the heirs: *Dresher v. Allentown Water Co.*, 52 Pa. St. 225; 91 Am. Dec. 150. It does not decide title nor create any new title; and parties to the proceeding, made such by publication, and without actual notice, are not estopped thereby from setting up their legal title: *McBain v. McBain*, 15 Ohio St. 337; 86 Am. Dec. 478; *Nicely v. Boyles*, 4 Humph. 177; 40 Am. Dec. 638. But the rule that a judgment is conclusive on all the issues determined by it, applies as well to judgments in partition as to judgments in any other form or kind of actions; and if title be put in issue, it is bound by the judgment: *Extended note to Nicely v. Boyles*, 40 Am. Dec. 640. See *Grisby v. Peak*, 68 Tex. 235; 2 Am. St. Rep. 487; *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95.

## FRANKLIN NATIONAL BANK v. WHITEHEAD.

[149 INDIANA, 560.]

**PLEDGES.**—To constitute a valid pledge there must be an actual or symbolical delivery of possession of the thing pledged, and to preserve the pledge the pledgee must retain that possession. If the property is in the possession of a warehouseman who has given a warehouse receipt therefor, the indorsement and delivery of that receipt are equivalent to the delivery of the property described therein.

**A CORPORATION POSSESSES ONLY SUCH POWERS** as are expressly given it by law, and such implied powers as are necessary to enable it to exercise the express powers thus given.

**A CORPORATION ORGANIZED TO MANUFACTURE NAILS AND OTHER PRODUCTS** of iron and steel is not authorized to engage in the business of a public warehouseman, nor to issue warehouse receipts.

**CORPORATION, AUTHORITY OF TO CARRY ON BUSINESS AS A WAREHOUSEMAN.**—Though a statute declares that any person or incorporated company desiring to keep a public warehouse shall be entitled to do so upon receiving a permit therefor from the auditor of the county, it does not authorize the carrying on of the business of warehouseman by a corporation organized for an entirely different purpose, as, for instance, to carry on the business of manufacturing and selling nails and other products of steel and iron.

**A WAREHOUSEMAN IS** a person who receives goods and merchandise to be stored in a warehouse for hire.

**WAREHOUSEMAN, WHO IS NOT.**—A corporation which never operated a warehouse, nor issued warehouse receipts, except upon its own property for the purpose of securing loans thereon, does not carry on the business of a warehouseman, either public or private.

**WAREHOUSE RECEIPTS, WHO MAY ISSUE.**—It is only those persons who pursue the calling of a warehouseman, that is, receive and store goods in a warehouse as a business for profit, that have the power to issue a technical warehouse receipt, the transfer of which is a good delivery of the goods represented by it.

**WAREHOUSE RECEIPTS ISSUED UPON WAREHOUSEMAN'S OWN PROPERTY.**—What purports to be a warehouse receipt issued by a corporation upon its own property, which remains in its possession, for the purpose of securing a loan made to it, does

not create any lien, and is void under a statute declaring that no assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee, unless such assignment or mortgage shall be duly acknowledged and recorded.

**WAREHOUSE RECEIPT ISSUED WITHOUT AUTHORITY AS COLLATERAL.**—If a debtor who is not a warehouseman issues a receipt purporting to be a warehouse receipt on property in his possession and owned by him, for the sole purpose of securing a credit, it is not in any sense a warehouse receipt.

**ESTOPPEL AGAINST CONTESTING WAREHOUSE RECEIPT.**—One who is not a warehouseman, but who issues what purports to be a warehouse receipt on his own property for the purpose of securing a creditor, is not estopped from proving that he was never a warehouseman, where the creditor had knowledge of the true state of facts, and was not deceived by any action of the debtor.

**LAW, KNOWLEDGE OF.—ONE DEALING WITH A CORPORATION** organized for the purpose of carrying on manufacturing and mining is bound to know that it had no power to carry on the business of a public or private warehouseman or to issue warehouse receipts, and that a public warehouseman has no authority to issue receipts on his own property in his public warehouse as security for his own debt or the debts of others.

**A CORPORATION MAY URGE THE DEFENSE OF ULTRA VIRES** as against its contract forbidden by statute or contrary to public policy, though it has received the benefit thereof.

**PLEDGE, DELIVERY NOT SUFFICIENT TO SUPPORT.** The setting apart of property for the benefit of a pledgee is not a sufficient delivery to support the pledge, where he had no knowledge of such setting apart, and never took possession of the property.

**A MORTGAGE OR ASSIGNMENT OF GOODS AS A SECURITY IS VOID** even as against creditors having notice thereof if it is neither acknowledged, recorded, nor accompanied by a delivery to the mortgagee or the pledgee of the property subject thereto.

**ASSIGNMENT FOR THE BENEFIT OF CREDITORS.**—The title of an assignee for the benefit of creditors prevails over that of a prior assignee or mortgagee whose assignment or mortgage is void against creditors, because neither acknowledged, recorded, nor followed by a delivery of the possession of the property subject thereto.

**AN ASSIGNEE FOR THE BENEFIT OF CREDITORS REPRESENTS,** and stands in the place of, creditors of the assignor, and has the right to contest claims and assert rights which, at the assignment, they had a right to contest or assert.

**RECEIVERS OF INSOLVENT CORPORATIONS MAY RESIST MORTGAGES AND ASSIGNMENTS** void because not acknowledged, recorded, nor accompanied by a delivery of the property mortgaged or assigned.

**CORPORATIONS, TRUST FUNDS.**—When a court takes possession of the property of an insolvent corporation for administration and appoints a receiver, such property becomes a trust fund for the payment of its debts.

**RECEIVERS, CREDITORS' RIGHT TO CONTEST CLAIMS AFTER THE APPOINTMENT OF.**—Where a receiver has been appointed of the property of an insolvent corporation, a



general creditor having a lien thereon, has a right to intervene and contest the validity and priority of other claims or asserted liens.

A RECEIVER OF AN INSOLVENT CORPORATION REPRESENTS ITS CREDITORS AS WELL AS ITS STOCKHOLDERS, and holds the property for the benefit of both. He is a trustee for both, and a trustee for the creditors may maintain and defend actions which the corporation could not, and hence may avoid a mortgage or assignment of goods on any ground open to the creditors of the corporation.

Daniel Waite Howe and Baker & Daniels, for the appellants.

W. A. Ketcham, Morris, Newberger & Curtis, and F. E. Matson, for the appellees.

**562** MONKS, J. In January, 1894, in a proceeding brought for that purpose, the court below appointed a receiver for the Greenfield Iron and Nail Company, an insolvent corporation, located at Greenfield, Indiana, who took possession of the property of said corporation under the order of the court, for the purpose of applying its assets to the payment of its debts. Appellants, two of the creditors of said corporation, filed their separate intervening petitions, claiming that by virtue of certain receipts, purporting to be public warehouse receipts, issued by said corporation, they had liens upon a large portion of the property of said **563** corporation, and were entitled to have the same set apart and applied to the payment of their claims. To these intervening petitions the receiver and the First National Bank of Brazil, on behalf of themselves and the other general creditors, filed separate answers. The court made a special finding of facts, upon which conclusions of law were stated against the Franklin National Bank of Brazil, on behalf of themselves and intervening petitioners, and, over their separate motions for a new trial, judgment was rendered against them.

The errors assigned call in question each conclusion of law and the action of the court in overruling the motions for a new trial. It appears from the special finding that the Greenfield Iron and Nail Company was organized on November 3, 1889, under the laws for the incorporation of manufacturing and mining companies, having its office and principal place of business at the city of Greenfield, Indiana. The object of said corporation, as set forth in its articles of association was, "the manufacture and sale of nails, and other products of steel and iron." In December, 1890, said company made a written application to the auditor of Hancock county for a permit to keep a public warehouse, and received a paper purporting to authorize it to operate a public warehouse of class B. Said company never

owned or operated a public warehouse of either class A or B, or pretended to, other than the room used in the manufacture of nails, never received any goods, wares, or merchandise on storage, or owned or leased a place for the storage of goods, and never issued any papers purporting to be warehouse receipts, except the papers so designated in this case, and a similar one to one of appellants, the Franklin National Bank, in a transaction similar to the one in which said bank received the papers mentioned <sup>564</sup> in its intervening petition. The effort of said Greenfield Iron and Nail Company to occupy the position of a warehouseman was to enable it to borrow money without impairing its credit by giving chattel mortgages or making pledges of its stock. While the company was engaged in carrying on its business, the nails manufactured were put in kegs, and upon the head of each keg was branded the name of the company and the kind and size of nails contained therein, and the kegs were placed in rows on one side of the rooms where made. Prior to December 9, 1890, the Greenfield Iron and Nail Company, by its president, applied to appellant, the Franklin National Bank, for a loan of five thousand dollars and promised to secure said loan by giving as collateral security therefor a warehouse receipt covering nails of sufficient value belonging to said company; and on the 9th of December, 1890, said bank loaned said company five thousand dollars, for which said company executed its note, payable one hundred and twenty days after date, indorsed by five persons; and it was required that said company should ship and store said nails in a regular warehouse in Indianapolis. Afterward, in January, 1891, said company made out a statement showing the sale of two thousand six hundred and seventy kegs of nails and the size and kind of nails in each keg, to said bank, valued at five thousand and nine dollars and ninety-five cents, and at the same time made out a receipt which recited that the Greenfield Iron and Nail Company, in its capacity of a public warehouseman, hereby certifies that it has received of the Franklin National Bank the following described property (describing the kegs of nails the same as in the invoice aforesaid, except no value is mentioned, and the words "marked 'Lot A,' " were used), which is deliverable to the order of said Franklin National Bank upon the return of "this receipt and the payment or tender of proper charges." This receipt was signed by the <sup>565</sup> company. Both of these papers were delivered by said company to the bank for the purpose of complying with its promise to secure said note. Afterward, in April and May, 1891, loans

were made by the National Bank of Rockville to said company, under like arrangements and conditions, to secure which like papers, except the kegs of nails were not designated as being marked "Lot A" or otherwise, were executed and delivered to the National Bank of Rockville. Afterward, in July, 1893, the company executed and delivered to the Rockville Bank, as additional security for said loans, papers of like kind for "800 kegs of cut steel nails 10 d com." No nails were in fact sold by said company to either of said banks, and said bank made no actual deposit of nails with the company, but said company, at the time said papers were delivered, had in its general stock, in its manufacturing establishment at Greenfield, nails of the kind described in said receipts. The failure of said company to ship the nails to Indianapolis, as agreed with the Franklin National Bank, was not known or assented to until said receipt and invoice were received and accepted by said bank, about February 1, 1891. The nails described in said several receipts were not removed from the room where manufactured and were not set apart or separated from the general stock then on hand of the same and different kinds, nor were they marked "A," or in any other manner except in common with all other nails manufactured by said company. The bank officers of said bank did not know the method of manufacture and storage of said nails or the kind of place where stored, or that said nails, described in the receipt of the Franklin National Bank, had not been set apart and marked "Lot A," as indicated in said receipt to the Franklin National Bank. Nor did they make any <sup>566</sup> inquiry or effort to ascertain the character of the pretended warehouse at Greenfield, or whether said nails were stored therein or at any other place, or as to what had been done or was being done with respect to said nails, but wholly relied upon said receipts. The loans evidenced by said notes were renewed from time to time by giving other notes with the same indorsers; and the same were accepted by the banks in reliance upon the papers held, respectively, as security for said loans. After the execution of said receipts the Greenfield Iron and Nail Company continued to manufacture nails, and when so manufactured the kegs in which they were placed were mingled indiscriminately with other kegs containing nails of a similar kind on hand at the dates of the execution of said receipts to said banks, and kept in the company's building, and sales were made by the company from time to time, and the nails sold were taken indiscriminately from the stock on hand, and no effort was made to distinguish between the nails on hand when



said receipts were executed and those subsequently made. That at the time of the execution and acceptance of said receipts, the nail company and the appellants intended to create a valid lien on the nails therein described, as collateral security for said loans. On January 4, 1894, the president of the Greenfield Iron and Nail Company gave directions that nails of the same kind and quality specified in the receipts held by said banks, respectively, be set apart and marked for said banks. On said day the company, to secure the Franklin National Bank a lien on said nails, without the knowledge of said bank, commenced to set apart nails of the same kind, quality, and description as those mentioned in the receipt given to said bank, so far as they were on hand, and the same were placed in piles and separated from other nails, and the piles <sup>567</sup> so set apart were designated as "Lot I." This was completed on January 13, 1894, before the appointment of a receiver. It cannot be determined how many of the nails, if any, so set apart were on hand when said receipt was given to said bank. No nails were set apart for the Rockville bank for the lack of time, as the receiver was appointed immediately after the completion of the work of setting apart the nails designated "Lot I." At the time the order was given to set apart said nails, on January 12, 1894, the Greenfield Iron and Nail Company was insolvent and in embarrassed circumstances, and was unable to meet or pay the claims against it, and when said order was given the officers of said company well knew that said company could not continue in business, and said order was made in contemplation and expectation of the appointment of a receiver, and that the same would be wound up as an insolvent concern. The receiver was appointed on January 13, 1894, and took possession of the property of said company, including the nails, in separate piles designated as "Lot I," but in resorting the nails in order to take an invoice, and in removing them from exposure to the weather, the nails in said piles were mingled with other nails of the same kind in the building. No warehouse charges for storage or other expenses were charged by said company against the holders of said receipts, nor was any scale or schedule of charges ever fixed or adopted by said company.

To constitute a valid pledge, there must be an actual or symbolical delivery of possession of the thing pledged, and, to preserve the pledge, the pledgee must retain the possession of the property. Ordinarily the physical possession of the property is delivered to and retained by the pledgee. If, however, the

property is delivered by the owner to a warehouseman and a <sup>568</sup> warehouse receipt is given therefor by the warehouseman, the indorsement of the warehouse receipt, and the delivery thereof to the pledgee is regarded, in law, as the delivery of possession to the pledgee of the property described in the warehouse receipt: Burns' Rev. Stats. 1894, secs. 8716, 8722, 8729 (Horner's Rev. Stats. 1897, secs. 6537, 6543, 6550); Hale on Bailments, 127; Jones on Pledges, secs. 23, 280, 281, 287.

The first question to be determined is whether the Greenfield Iron and Nail Company was authorized to engage in the business of public warehouseman, and as such issue warehouse receipts.

The special finding shows that said Greenfield Iron and Nail Company was organized under the laws for the incorporation of manufacturing and mining companies, and that its object, as stated in the articles of association, was to manufacture and sell nails and other products of steel and iron. A corporation possesses only such powers as are expressly given by law, and such implied powers as are necessary to enable them to exercise the power expressly given: *State Board v. Citizens' Street Ry. Co.*, 47 Ind. 407, 409; 17 Am. Rep. 702; Clark on Corporations, 120. The business of public warehouseman was not necessary or incidental to the business of said company in manufacturing or selling nails or other products of steel or iron. It is evident that such company was not authorized, by the laws under which it was organized, to engage in the business of public warehouseman or to issue warehouse receipts.

It is insisted, however, by appellants, that as said company made a written application to the auditor of Hancock county, and obtained a permit from him to carry on the business of public warehouseman under the provisions of section 8704 of Burns' Revised Statutes 1894 (Horner's Rev. Stats. 1897, sec. 6525), it was fully authorized, by said <sup>569</sup> section, to carry on that business and issue warehouse receipts.

The section referred to is the first section of the public warehouse act of 1875, as amended in 1879, and the part relied upon by appellants is as follows: "Any person or incorporated company desiring to keep any such public warehouse shall be entitled to do so upon receiving a permit therefor from the auditor of the county in which such warehouse shall be kept": Burns' Rev. Stats. 1894, sec. 8704. If appellants' construction of said section is the correct one, then all the corporations in the state, whether educational, charitable, religious, commercial, or otherwise, whatever may be the provisions of the law under which

organized, are given the right of going into and carrying on the business of public warehousemen. While the language quoted from said section is very broad, it was certainly not the intention of the legislature to confer on all the corporations in the state, without regard to the law under which they were organized, and the purposes and objects of their organization, the privileges of public warehousemen. As well hold that persons without capacity to contract on account of infancy, insanity, or other disqualifications were, by said statute, authorized to engage in the business of public warehousemen and execute valid warehouse receipts.

A warehouseman is defined to be the owner of a warehouse; one who, as a business and for hire, keeps and stores the goods of others: *Black's Law Dictionary*. A person who receives goods and merchandise to be stored in his warehouse for hire: *Bouvier's Law Dictionary*; 28 *Am. & Eng. Ency. of Law*, 636, 637; *Edwards on Bailments*, sec. 332; *Hale on Bailments*, 238.

Only such corporations as are authorized by the law under which they are organized to carry on the business <sup>570</sup> of warehouseman can avail themselves of the provisions of said act of 1875 (Acts 1875, p. 172), as amended by the act of 1879 (Acts 1879, p. 230), being sections 8704, 8719 of *Burns' Revised Statutes*, 1894 (*Horner's Rev. Stats.* 1897, secs. 6525, 6540). It follows that said nail company was not authorized to operate as a public warehouseman, or issue any warehouse receipts under the provision of said act of 1875, as amended by the act of 1879.

Appellants insist that, if the nail company could not become a public warehouseman, then its acts, as stated in the special finding, made it a private warehouseman, under the act of 1879 (Acts 1879, p. 231; *Burns' Rev. Stats.* 1894; secs. 8720-8729; *Horner's Rev. Stats.*, 1897, secs. 6541, 6550), and the receipts issued to appellants are sufficient, in equity, to carry out the intent of the nail company and appellants, by creating in appellants a lien upon the nails described in said receipts.

Section 8720 (6541), *supra*, provides that "Every person, firm, company or corporation, receiving cotton, tobacco, pork, grain, corn, rye, oats, wheat, hemp, whisky, coal, any kind of produce, wares, merchandise, commodity, or any other kind or description of personal property or thing whatever, in store, or undertaking to receive or take care of the same, with or without compensation or reward therefor, shall be deemed and held to be a warehouseman." Said nail company was not authorized by the law under which it was organized to engage in the business of pri-



vate warehouseman any more than it was authorized to carry on the business of public warehouseman, and the special finding shows that the said nail company never received any goods, wares, or merchandise or other property on store from any one, and that it was not engaged in business as a warehouseman and never had been, and did not operate a warehouse, and that <sup>571</sup> no receipts were ever issued by it, except to said appellants. It is clear from the finding that the nail company never in fact kept a warehouse to store goods in, and was not engaged in business as a public or private warehouseman, nor was it authorized to engage in such business. In *Sinsheimer v. Whitely*, 111 Cal. 378, 52 Am. St. Rep. 192, the court said: "It is only persons who pursue the calling of warehousemen—that is, receive and store goods in a warehouse as a business for profit—that have the power to issue a technical warehouse receipt, the transfer of which is a good delivery of the goods represented by it: *Shepardson v. Cary*, 29 Wis. 42; *Bucher v. Commonwealth*, 103 Pa. St. 534; *Edwards on Bailments*, sec. 332."

In Minnesota, where the rule that a warehouseman can pledge his own goods in his warehouse to secure an indebtedness, by issuing a warehouse receipt to the pledgee, prevails, it is held that one who is not a warehouseman cannot give a valid warehouse receipt upon his own property, in his own possession, to secure his own debt: *National etc. Bank v. Wilder*, 34 Minn. 149, 155, 157; *Fishback v. Van Dusen*, 33 Minn. 111. In the case of *National etc. Bank v. Wilder*, 34 Minn. 149, 155, 157, the court said: "The owner of goods, if a warehouseman, can pledge the same by issuing and delivering his own warehouse receipt to the pledgee. . . . When the pledgor or the vendor is a warehouseman, the public has notice from that fact that the title and legal possession of property in his warehouse may be in others, although the actual physical possession is in himself."

In *Geilfuss v. Corrigan*, 95 Wis. 651, 60 Am. St. Rep. 143, one Schleisinger owned two corporations—one the Buffalo Mining Company, a mining corporation engaged in mining ore in Michigan; the other the Douglas Furnace Company, engaged in <sup>572</sup> smelting ore in Pennsylvania; the furnace company had a large stock of pig iron constantly on hand in its yards in Pennsylvania. In order to raise money for the furnace company Schleisinger caused the furnace company to issue apparent storage receipts to the mining company, without consideration and without agreement to purchase, and without selection or deliv-

ery, and with the agreement that the receipts should be returned whenever the furnace company needed them on account of sales of iron. On receiving the receipts, he borrowed money of the plaintiff bank upon the notes of the mining company, secured by assignment of the receipts as collateral. The plaintiff bank took said receipts innocently, and without knowledge of any defect. The court said: "In order to be such [warehouse receipts] they must be issued by a warehouseman or one openly engaged in the business of storing property for others for a compensation. . . . : *Bucher v. Commonwealth*, 103 Pa. St. 528; *Shepardson v. Cary*, 29 Wis. 34. And the fact that the receipt was executed by a warehouseman must affirmatively appear in the evidence: *Shepardson v. Cary*, 29 Wis. 34. Not only was there no proof in this case that the furnace company was in the warehousing or storage business, but, on the contrary, the proof was conclusive that it was not in such business, and never had been. The fact that it surreptitiously issued the false receipts in question did not constitute it a warehousing corporation. As well might it be argued that the issuance of counterfeit bank bills constitutes the counterfeiter a bank. It seems that, had the receipts been negotiable warehouse receipts, the bank would have acquired a valid lien upon the iron they represented by the transfer and indorsement of the receipts to it by the Buffalo Mining Company. . . . But we may dismiss this question, because they were not <sup>573</sup> such certificates, and the plaintiff obtains no advantage from the fact that they were in the usual form thereof. Nor were the certificates valid as chattel mortgages upon the iron named in them, not only because they are not chattel mortgages in legal effect, but also because by the law of Pennsylvania, as well as by the law of Wisconsin, a chattel mortgage is only valid as to third persons when filed in the proper office, and there is no claim of any filing here."

The private warehouse act of this state (Acts 1879, p. 231; Burns' Rev. Stats. 1894, secs. 8720-8729; Horner's Rev. Stats., 1897, secs. 6541-6550), is substantially the same as the warehouse act of March 6, 1869, of the state of Kentucky, and was no doubt taken from that act. In *Mechanics' Trust Co. v. Dandridge* (Ky., Oct. 24, 1896), 37 S. W. Rep. 288, Dandridge gave a receipt purporting to be a warehouse receipt for property left in his possession, which receipt was pledged to Mason, Gooch & Hodge Company by its holder as collateral security for a debt, and the Kentucky court of appeals, in construing said statute,

held that the same was not a warehouse receipt, and that Mason, Gooch & Hodge Company had no lien at all on the property. The court said: "The statute . . . evidently refers to only such persons as in fact keep a warehouse to store goods in, and are engaged in that business. It cannot be that it was the intention of the legislature to provide that any one and all persons might become legal warehousemen by simply receiving one particular piece of property in store and issuing a receipt therefor. There is no pretense that Dandridge was engaged in keeping a warehouse and storing property therein as a business. It therefore follows that the receipt in question was and is invalid and ineffectual, and the indorsement thereof passed no interest in the property. It is, as a general rule, indispensable that possession must accompany <sup>574</sup> a pledge of property in order to vest the pledgee with a title or interest therein. . . . It is therefore perfectly manifest that there was no change of possession, and nothing to warn the public of any change. . . . If appellee [Mason, Gooch & Hodge Company] desired to acquire a lien on the property, it could have done so by obtaining a mortgage, and then it would have been secure, and no other creditor need to have been misled. It is not necessary to discuss the question of notice, because appellees have no lien at all on the property, and it is wholly immaterial whether the appellant knew of the receipt or not."

It follows that even if the nail company was authorized by statute to engage in business as a private warehouseman, it not having done so, said receipts, even if they purported to be issued by it as a private warehouseman, would be invalid and ineffectual and would not create a lien on the property described therein. Besides, we do not think that the nail company had any power or authority to issue warehouse receipts upon its own property, in its own possession, and deliver the same as a pledge to secure an indebtedness, even if it was engaged in business as a public warehouseman, and was fully authorized by the law to carry on such business. Such a receipt would not, in a technical sense, be a warehouse receipt, and even if between the parties it created a lien, as to which we need not and do not decide, it would be void as against all other persons, under section 10 of the act for the prevention of frauds and perjuries, being section 6638 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 4913), which provides that "No assignment of goods, by way of mortgage, shall be valid against any other person than the parties thereto, where such goods



are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage <sup>575</sup> shall be acknowledged, as provided in case of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor resides, within ten days after the execution thereof": *Saint Joseph Hydraulic Co. v. Wilson*, 133 Ind. 465, 474.

It may be true, as claimed by appellants, that a private warehouseman is authorized by section 5 of the act of 1879, page 231, being section 8724 of Burns' Revised Statutes of 1894 (*Horner's Rev. Stats. 1897*, sec. 6545), to issue warehouse receipts for his own property actually in store and under his control at the time of giving the receipt. The entire act of which said section 8724 (6545), *supra*, forms a part, seems to have been taken from the statute of Kentucky, and the court of last resort in that state has held that said section authorizes a warehouseman to issue warehouse receipts upon his own property in the manner and under the conditions provided in said act: *Cochran v. Ripy*, 13 Bush, 495; *Ferguson v. Northern Bank*, 14 Bush, 555; 29 Am. Rep. 418. If a private warehouseman has such authority in this state, it is by virtue of said section 8724 (6545), *supra*, and without said section he would have no such power: *Jones on Pledges*, sec. 325; *Hale on Bailments and Carriers*, 128. Said act, however, is distinct in form and purpose from the public warehouse act of 1875, as amended March 29, 1879, sections 8704-8719 of Burns' Revised Statutes of 1894 (*Horner's Rev. Stats. 1897*, secs. 6525-6540), and said acts are entirely independent of each other: *Miller v. State*, 144 Ind. 401, 404. It is clear that said section does not authorize a public warehouseman to issue warehouse receipts on his own property, nor is there anything in the public warehouse act which authorizes it.

It follows that a public warehouseman would have no more power to issue a warehouse receipt upon his own property in his warehouse, as security for a debt, <sup>576</sup> unless there was a statute expressly authorizing it, than would a debtor who is not a warehouseman. Where a debtor who is not a warehouseman issues a receipt purporting to be a warehouse receipt, on property in his possession and owned by him, for the sole purpose of securing a creditor, the same is not in any sense a warehouse receipt: *Conrad v. Fisher*, 37 Mo. App. 4352; *Mechanics' Trust Co. v. Dandridge* (Ky., Oct. 24, 1896); *Sinsheimer v. Whitely*, 111 Cal. 378; 52 Am. St. Rep. 192; *Geilfuss v. Corrigan*, 95 Wis. 651; 60 Am. St. Rep. 143; *National etc. Bank v. Wilder*, 34 Minn.

149; *Steaubli v. Blaine Nat. Bank*, 11 Wash. 426; *Thorne v. First Nat. Bank*, 37 Ohio St. 254; *Union Trust Co. v. Trumbull*, 137 Ill. 146, 164; *Jones on Pledges*, secs. 325, 326.

In *Union Trust Co. v. Trumbull*, 137 Ill. 146, *T. W. Hall & Company*, merchants and factors in wool, issued a receipt for their own wool in their own possession to one *Vehmeyer*, as security for money borrowed from him, and the court held that he was not entitled to a lien on the wool described in said receipts. The court on page 164, said: "His claim is based on a receipt issued by *Hall & Co.*, who were not public warehousemen, and which was therefore of no more effect as a lien than a certificate issued by any other property owner. It is only where property is stored in a public warehouse that a receipt may be given which will evidence a lien upon the property."

In *Thorne v. First Nat. Bank*, 37 Ohio St. 254, it was held that an instrument, substantially like a warehouse receipt, issued to a creditor by a debtor, who was not a warehouseman, on his own property, for the sole purpose of securing the creditor, was void as against other creditors, when the property remained in the possession of the debtor, for the reason that it was an attempt to create a lien upon personal property contrary <sup>577</sup> to the provisions of the statute making chattel mortgages void if not accompanied by delivery of possession unless the mortgage, or a copy thereof, was deposited in the office of the officer named in the statute.

It is insisted, however, by appellants that the nail company is estopped from denying that it was a warehouseman, and that it held as such the nails mentioned in the receipts, for and subject to their order. We do not think the nail company was estopped as claimed by appellants. It is true, as urged by appellants, that when a person is carrying on the business of warehousemen, public or private, under our statutes, and he issues warehouse receipts which comply with the requirements of the statutes under which he is operating his warehouse, and the person to whom said receipts have been issued indorses the same to innocent holders for value, that the warehouseman is estopped from denying that he holds the goods described on the terms specified in the receipts; but this rule has no application here for the reason that it is not shown by the special finding that the nail company is a public or private warehouseman, or that it was engaged in such business or had any power to do so, or that said receipts have been indorsed to an innocent holder, but the special finding shows that said company was not a warehouseman, public or private, and never had been, and had no power to en-

gage in such business or issue warehouse receipts. The rule is that to constitute a valid estoppel by conduct, there must be knowledge on the part of the person to be estopped, and a want of knowledge on the part of the party relying on the estoppel, and there can be no estoppel when there is notice or knowledge on the part of the person relying upon the estoppel: <sup>578</sup> First Nat. Bank v. Williams, 126 Ind. 423, 429, 430; Buck v. Milford, 90 Ind. 291, 293, and cases cited; Stewart v. Beck, 90 Ind. 458. If the nail company could be estopped as insisted by appellants, it would only be, if at all, when appellants had no notice or knowledge that the nail company was not a warehouseman, and was not engaged in such business, and had no power to engage in such business or issue warehouse receipts, but believed in good faith that it was engaged in such business, and had the power to do so and issue warehouse receipts, and that, relying upon such facts, they accepted the receipts and made the loan on the faith thereof. To sustain the estoppel claimed by appellants against the nail company, the facts necessary to constitute the same must be clearly stated in the special finding, leaving nothing to intendment: First Nat. Bank v. Williams, 126 Ind. 423. No such facts are stated in the special finding, but, on the contrary, so far as the special finding shows, appellants knew that the nail company was engaged in the manufacture of nails, and that it was organized under the laws for the incorporation of manufacturing and mining companies, and was not a warehouseman public or private, and never had been, and was not authorized to carry on such business or issue such receipts. Besides, they were bound to know that, under our statutes, a corporation, organized under the law for the incorporation of manufacturing and mining companies, had no power to carry on either a public or private warehouse, or issue warehouse receipts; and that a public warehouseman had no authority to issue warehouse receipts on his own property in his public warehouse, as a security for his own debts or the debts of others.

It is insisted by appellants that if the nail company was not authorized to be a public warehouseman, and <sup>579</sup> had no right to issue public warehouse receipts on its own property to secure its own debts, its acts in doing so were merely ultra vires, and as such contracts have been performed by appellants in loaning said nail company the money, that after receiving the benefits of the contract, it cannot avoid such warehouse receipts on the ground that it has exceeded its corporate powers in issuing them. There is much conflict in the decisions of courts of last



resort as to the doctrine urged, but in the jurisdictions where it prevails the rule is that when a corporation enters into a contract, merely beyond its powers, which, if made by a private person, would have been binding upon him, and such contract has been performed by the other party thereto, the corporation will not be permitted to deny its power to make such contract, but the same may be enforced against it. It would seem that what we have already said in regard to the nail company being estopped to deny that it was a warehouseman, and had the power to issue said receipts and hold said nails for appellants, is a sufficient answer to this contention of appellants, but we think there are also other reasons why such contention cannot prevail. But, as we have shown, a public warehouseman, whether a corporation or an individual, cannot issue a public warehouse receipt on his own property, in such warehouse, as security for his own debts or the debts of others, and such receipt, if issued, creates no lien on such property. The rule urged cannot, therefore, apply to this case, even if it were conceded that the nail company was authorized by law to engage in the business of public warehouseman, and was actually engaged in such business. Besides, the doctrine urged does not apply to contracts where the same are forbidden by statute or are contrary to public policy: *State Board v. Citizens' Street Ry.* <sup>580</sup> Co., 47 Ind. 407, 411; 17 Am. Rep. 702; 27 Am. & Eng. Ency. of Law, 378. As we have shown, any attempt by any person to create a lien on his personal property, except in the manner provided in section 10 of the statutes for the prevention of frauds and perjuries, is void, and if by an assignment by way of mortgage, the same, unless recorded within ten days after its execution, is void as to all persons except the parties thereto. As there was no law authorizing the nail company to issue said receipts, and thus create a lien on said personal property, the creation of a lien in that manner is expressly forbidden by section ten of the act for the prevention of frauds and perjuries, being section 6638 (4913), supra: *Saint Joseph Hydraulic Co. v. Wilson*, 133 Ind. 474.

It is clear that the only interest appellants can claim in said nails under said receipts is that of a lien thereon as pledgees. To make a valid pledge there must have been either an actual or constructive delivery of the property described in the receipts. Good faith does not make good a pledge unless there has been a delivery and possession, either actual or constructive. The special finding shows that there was no actual delivery when the receipts were executed. There was no delivery unless the delivery of the receipts to appellants was a constructive delivery.

If the nail company had been a warehouseman, and authorized to issue said receipts, upon its own property, and they had in all respects conformed to the requirements of our statutes, the delivery thereof, as collateral security to secure said loans, might have been sufficient constructive delivery. But this rule, as we have shown, does not apply to property in the possession of the pledgor, who is not a warehouseman, and in such case the delivery of the receipts is not a constructive delivery of the property described <sup>581</sup> in the receipts: *Shepardson v. Cary*, 29 Wis. 34; *Geilfuss v. Corrigan*, 95 Wis. 651; 60 Am. St. Rep. 143. The setting apart of the nails described in the receipt to the appellant, the Franklin National Bank, just before the appointment of a receiver, was without the knowledge of said bank, and was not a delivery to said bank, nor did said bank then or at any time take or have possession of said nails. As there was no actual or constructive delivery of the nails to appellants, and they never had actual or constructive possession thereof, they had no lien thereon as pledgees. There is no mode, under the law of this state, except by chattel mortgage, duly acknowledged and recorded, by which the owner of personal property, retaining its possession, can give another a lien upon it, that can be enforced against any person except the parties thereto: *Saint Joseph Hydraulic Co. v. Wilson*, 133 Ind. 474. There having been no delivery of possession, actual or constructive, of said property, said receipts, even if valid as to the nail company and appellants, were void as to third parties, under section 10 of the act for the prevention of frauds and perjuries, being section 6638 (4913), *supra*. It will be observed that under said section an assignment or mortgage of goods as security is only valid as to the parties thereto, and is void as to all other persons, while in many of the other states it is only void as to creditors and purchasers for value without notice.

In *Saint Joseph Hydraulic Co. v. Wilson*, 133 Ind. 474, this court, in speaking of equitable and other liens where there was no delivery and retention of possession of the property upon which the lien was claimed said: "But in each there is that feature of an 'assignment of goods' which 'as against any other person than the parties' renders it invalid under our statutes, unless acknowledged and recorded. The <sup>582</sup> cases of *Kennedy v. Shaw*, 38 Ind. 474; *Lockwood v. Slevin*, 26 Ind. 124; *Ross v. Menefee*, 125 Ind. 432; *Scarry v. Bennett*, 2 Ind. App. 167; *Boone on Mortgages*, section 253, notes 14, 15, establish the invalidity of such an 'assignment of goods,' even as to third per-

sons with actual notice of the lien. This court held in *Granger v. Adams*, 90 Ind. 87, that one who asserts a right under such an instrument, paramount to the claims of creditors, must show that all has been done which the statute requires." Under said section, therefore, an assignment of goods by way of mortgage, if not recorded within ten days after its execution, is void as against a subsequent purchaser, even though he had actual notice thereof: *Ross v. Menefee*, 125 Ind. 432; *Saint Joseph Hydraulic Co. v. Wilson*, 133 Ind. 474, 475; *Stengel v. Boyce*, 143 Ind. 642, 646, and cases cited; *Granger v. Adams*, 90 Ind. 87; *Kennedy v. Shaw*, 38 Ind. 474. Such an assignment of goods is also void as against an assignee under a voluntary assignment for the benefit of creditors, and it is his duty to take advantage of the failure to record the same in ten days after its execution: *Lockwood v. Slevin*, 26 Ind. 125, 128; *Saint Joseph Hydraulic Co. v. Wilson*, 133 Ind. 474; *Hanes v. Tiffany*, 25 Ohio St. 549; *Blandy v. Benedict*, 42 Ohio St. 295; *Thorne v. First Nat. Bank*, 37 Ohio St. 254; *Bingham v. Jordan*, 1 Allen, 373; 79 Am. Dec. 748; *Adams v. Merchants' Nat. Bank*, 9 Biss. 396, 403; 2 *Cobbe* on Chattel Mortgages, sec. 619; *Jones on Chattel Mortgages*, sec. 314, and cases cited. The assignee is regarded as representing and standing in the place of the creditors, as well as the assignor, and he therefore has the right to contest claims and the rights to property which the assignor did not possess: *Lockwood v. Slevin*, 26 Ind. 124; *Voorhees v. Carpenter*, 127 Ind. 300, 301, and cases cited; *Cooper v. Perdue*, 114 Ind. 207; *Seibert v. Milligan*, 110 Ind. 583 106; *Hasseld v. Seyfort*, 105 Ind. 534; *Adams v. Merchants' Nat. Bank*, 9 Biss. 403. The assignment is made for the benefit of creditors, and the assignee holds the property in trust for them, and as such he can enforce any right and reach any property that a general creditor could enforce either before or after obtaining judgment and execution, in case there had been no assignment: *Lockwood v. Slevin*, 26 Ind. 124; *Kilbourne v. Fay*, 29 Ohio St. 264, 278, 279; 23 Am. Rep. 741; *Hanes v. Tiffany*, 25 Ohio St. 549; *Adams v. Merchants' Nat. Bank*, 9 Biss. 396.

It is clear from the language of section 6638 (4913), *supra*, that as such trustee for the creditors he is not a party to any assignment of personal property by way of mortgage made by the assignor, within the meaning of said section. If an unrecorded assignment of goods, by way of mortgage, is void as against an assignee for the benefit of creditors, for the same reason it is also void as against a receiver of an insolvent corporation.



When a court has taken possession of the property of an insolvent corporation for administration, and appointed a receiver, the property of the corporation is a trust fund for the payment of its debts: *First Nat. Bank v. Dovetail etc. Co.*, 143 Ind. 534, 542, 543, and cases cited; *First Nat. Bank v. Dovetail etc. Co.*, 143 Ind. 550, 553, 554; 52 Am. St. Rep. 435; *Henderson v. Indiana Trust Co.*, 143 Ind. 561; *Graham Button Co. v. Spielmann*, 50 N. J. Eq. 120. And a general creditor has a lien upon such property, and therefore has the right to intervene and contest the validity as well as the priority of other claims or asserted liens: *Farmers' Loan etc. Co. v. San Diego Street Car Co.*, 45 Fed. Rep. 518, 520; *Richardson v. Green*, 133 U. S. 30, 44; 2 Cook on Stocks and Stockholders, sec. 788, p. 1272, notes 1, 2. Such receiver represents the <sup>584</sup> creditors as well as the stockholders and holds the property for the benefit of both. He is the trustee for both, and, as trustee for the creditors, can maintain and defend actions which the corporation could not: *Nat. State Bank v. Vigo County Nat. Bank*, 141 Ind. 352, 356; 50 Am. St. Rep. 330, and authorities cited; *Graham Button Co. v. Spielmann*, 50 N. J. Eq. 120; *Hopper v. Lovejoy*, 47 N. J. Eq. 573; *Farmers' Loan etc. Co. v. Minneapolis etc. Works*, 35 Minn. 543; 5 Thompson on Corporations, secs. 6945, 6946, 6952; Gluck and Becker on Receivers of Corporations, 168; Beach on Receivers (Alderson's ed.), secs. 298, 455. As trustee representing the creditors of an insolvent corporation, he is not, therefore, a party to an assignment of goods made by the corporation to secure an indebtedness, within the meaning of section 6638 (4913), supra. As such trustee, representing the creditors, he may avoid an assignment of goods by way of a mortgage made by the corporation, on the grounds that it was not recorded within the time required by law: *Farmers' Loan etc. Co. v. Minneapolis etc. Works*, 35 Minn. 543; *Rudd v. Robinson*, 54 Hun, 339, 346-348; *Graham Button Co. v. Spielmann*, 50 N. J. Eq. 120; *Hopper v. Lovejoy*, 47 N. J. Eq. 573; Gluck and Becker on Receivers of Corporations, 168; Beach on Receivers (Alderson's ed.), p. 726; 5 Thompson on Corporations, sec. 6952.

It is clear, therefore, even if said receipts created a lien on said nails as against the nail company that they were void as to the general creditors and the receiver as trustee for them, and that the general creditors could reach the same through the receiver and by intervening petitions, the same as the general creditor could have done after levying writs of attach-

ment thereon, or after obtaining judgment and execution, if there had been no receivership. Appellees claim <sup>585</sup> that, as the receipts did not state any distinguishing marks, that they were invalid.

The public warehouse law requires that "all warehouse receipts for property stored in public warehouses of Class B shall distinctly state on their face the brand or distinguishing mark on such property." Such receipts must so describe the property that it can be identified by such description from other property of like kind. The private warehouse law contains a like requirement. The view we have taken of this case renders it unnecessary for us to determine whether or not the description of the property contained in the receipts complied with the law.

We have read the evidence, and the same sustains the finding of the trial court. It follows, from what we have said that the court did not err in its conclusions of law, nor in overruling the motion for a new trial.

Judgment affirmed.

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**PLEDGE—DELIVERY OF PROPERTY.**—To make a valid pledge, there must be either an actual or constructive delivery of the property pledged; and good faith does not avail the pledgee, in the absence of delivery and possession, either actual or constructive: *Gelfuss v. Corrigan*, 95 Wis. 651; 60 Am. St. Rep. 143, and note. A pledgee's title must fail unless the pledged property is delivered to and retained by him: *Moors v. Reading*, 167 Mass. 322; 57 Am. St. Rep. 460, and note; *First Nat. Bank v. Caperton*, 74 Miss. 857; 60 Am. St. Rep. 540, and note.

**CORPORATIONS—POWERS OF—CONSTRUCTION.**—Corporations possess such powers and such only as the law of their creation confers upon them: *Note to Northside Ry. Co. v. Worthington*, 53 Am. St. Rep. 789. If a corporation is confined to one kind of business it cannot lawfully engage in enterprises foreign to that business: *People v. River Raisin etc. R. R. Co.*, 12 Mich. 389; 86 Am. Dec. 64.

**CORPORATIONS—LIMITATIONS UPON POWERS OF—DUTY OF THIRD PERSONS TO NOTICE.**—Notice must be taken by all persons of the limitations upon the power of a corporation contained in the laws of the state. Therefore, no one can be regarded as deceived into the supposition that a corporation can make a contract into which it has sought to enter, if the power to make it is denied by law: *Durkee v. People*, 155 Ill. 354; 46 Am. St. Rep. 340, and note; *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416; 34 Am. St. Rep. 815, and note.

**WAREHOUSEMEN—POWER TO ISSUE WAREHOUSE RECEIPTS.**—It is only persons who pursue the calling of warehousemen, by receiving and storing goods in a warehouse as a business for profit, that have power to issue technical warehouse receipts, the transfer of which is a good delivery of the goods represented by them: *Sinshelmer v. Whitely*, 111 Cal. 378; 52 Am. St. Rep. 192, and note. Thus although a corporation engaged in smelting ore

issues so-called "storage warrants" on iron in its yard, the title to, and constructive possession of the property covered thereby, does not pass by their transfer and indorsement, as in the case of negotiable warehouse receipts. The surreptitious issuance of false "storage warrants," or receipts by such a corporation, does not constitute it a warehousing corporation: *Gellfuss v. Corrigan*, 95 Wis. 651; 60 Am. St. Rep. 143, and note.

**CHATTEL MORTGAGE—ESSENTIALS OF.**—A mortgage of chattels must be recorded or the property must be delivered to, and retained by, the mortgagee: *Moors v. Reading*, 167 Mass. 322; 57 Am. St. Rep. 460, and note. Though it is generally held that one having notice of the existence of a chattel mortgage cannot treat it as void because it has not been filed for record: *Union Nat. Bank v. Oium*, 3 N. Dak. 193; 44 Am. St. Rep. 533; note to *Brown v. J. H. Campbell Co.*, 21 Am. St. Rep. 283.

**ASSIGNMENT FOR BENEFIT OF CREDITORS—TITLE OF ASSIGNEE.**—A valid voluntary assignment for the benefit of creditors, transfers the title of all the assignor's property to the assignee: *Medinah Temple Co. v. Currey*, 162 Ill. 441; 53 Am. St. Rep. 320; *Doherty v. Ramsey*, 1 Ind. App. 530; 50 Am. St. Rep. 223. His position, however, is none better than that of the creditors whom he represents: *Brown v. Brabb*, 67 Mich. 17; 11 Am. St. Rep. 549, and note; and he succeeds only to the assignor's title: *Millhiser v. Erdman*, 98 N. C. 292; 2 Am. St. Rep. 334; *National Butcher's etc. Bank v. Hubbell*, 117 N. Y. 384; 15 Am. St. Rep. 515; *Roberts v. Corbin*, 26 Iowa, 315; 96 Am. Dec. 146.

**RECEIVERS—APPOINTMENT OF—EFFECT.**—A receiver is a quasi trustee, holding the fund for the benefit of whomever may eventually establish title thereto: *King v. Goodwin*, 130 Ill. 102; 17 Am. St. Rep. 277.



**CASES**  
**IN THE**  
**APPELLATE COURT**  
**OF**  
**INDIANA.**

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**FASSNACHT v. EMSING GAGEN COMPANY.**

[18 INDIANA APPEALS, 80.]

**PRINCIPAL AND SURETY—ABSENCE OF SIGNATURE BY PRINCIPAL.**—The mere fact that the surety alone signed a note does not release him.

**PRINCIPAL AND SURETY—CONCEALMENT OF FACTS BY PAYEE—FRAUD.**—If the surety signed as security, not knowing the exact amount, but supposing it was for the purchase price of certain goods, and the payee knew this to be the belief of the surety, but also knew that the amount included a pre-existing debt, his failure to inform the surety was in law a fraud that would release the surety from the entire contract.

**PRINCIPAL AND SURETY—INSTRUCTION AS TO FACTS.**—It is error for the court to instruct the jury that if the note in suit "is a perfect note on its face, that it is a strong inference that the party signing the same did so as principal, and not otherwise."

Charles H. Henderson, for the appellant.

G. P. Haywood and C. A. Burnett, for the appellee.

**81 BLACK, J.** This was an action upon a promissory note for two hundred and nineteen dollars and ten cents, with interest and attorney's fee, brought by the appellee, the payee, against the appellant, the maker.

There was an answer in five paragraphs. The first paragraph was a general denial. The second was a plea of want of consideration. The third alleged that the appellant signed the note as surety for her son, Henry Fassnacht, and that for all of the note over one hundred and seventy-six dollars there was no consideration. In the fourth, the appellant alleged that she did not execute the note. In the fifth, she alleges that her

signature to the note was procured by fraud on the part of the appellee toward the appellant, in this: That the appellant is an old German woman and not able to read the English language, and speaks English quite poorly, and is not versed in the ways of business; that on the date on which the note was signed Peter Gagen, "one of the plaintiffs or members of the plaintiff's firm," came to the appellant's house in the country, and gave the note to appellant to sign; that said Gagen told her that it was all right for her to sign the note, as she was going security for her son Henry, that Henry had purchased goods at appellee's place of business, and said she was to go his security; that he did not tell her the amount of the note, nor did she know the amount; that she signed the note with the understanding that she was to go her son, Henry Fassnacht's, security; that her <sup>82</sup> son Henry never signed the note as principal, nor did he owe or purchase goods to the amount of two hundred and nineteen dollars and ten cents of the appellee; that her son Henry purchased of the appellee the sum of one hundred and seventy-six dollars' worth of goods, and no more; that the appellee fraudulently and without right made out the note for two hundred and nineteen dollars and ten cents, and fraudulently procured the appellant's signature thereto with the intent to cheat and defraud the appellant; that the note was without any consideration whatever; that the appellant never owed the appellee any sum of money; that she never agreed to stand good for any goods purchased by her son Henry, or any other person, from the appellee; that she signed the note believing that she was only giving security for her son Henry; that the appellant failed to get said Henry Fassnacht to sign the note; that he never did sign it; and that it was given without consideration to the appellant. The fourth and fifth paragraphs of answer were sworn to by the appellant.

The appellee replied to all the paragraphs of answer except the first by general denial.

The cause was tried by jury, and a verdict was returned for the appellee in the sum of two hundred and one dollars and ten cents, of which the sum of twenty-five dollars was for attorney's fee.

The appellant's motion for a new trial was overruled, and this ruling is assigned as error. Under this assignment the appellant has insisted in argument, first, that the verdict was contrary to law, and not supported by sufficient evidence.

The evidence was somewhat conflicting as to whether the

appellant signed the note with the understanding that she was doing so as "security" for her son Henry, though there was much evidence to the contrary.

There was no evidence whatever of any promise or agreement that the signature of the son would be secured or made, or of any direction from any person <sup>83</sup> that it should be obtained; nor was there any allegation of such a promise or agreement or direction in the pleadings.

The mere fact, if it was a fact, that the appellant executed the note as "security" for her son would not release her, though it was signed by her alone: See *McQuesten v. Noyes*, 6 N. H. 19; *Fowler v. Brooks*, 13 N. H. 240; *Brandt on Suretyship and Guaranty*, sec. 38.

In the amount of the note was included the sum of forty-three dollars, which was a pre-existing debt of the son Henry to the appellee, or which he had agreed to pay the appellee for goods theretofore furnished by the appellee to a saloon conducted by one Rosenburger, or in his name. At the time the note was given, the son, Henry, purchased goods to the amount of one hundred and seventy-six dollars and ten cents from the appellee. There was some evidence to the effect that it was agreed between the appellee and the said Henry that this pre-existing debt should be included in the note. But as to whether there was such an agreement, the evidence was conflicting.

There was evidence from which it might have been inferred by the jury that the appellant had no knowledge that the note was being given for more than the amount of the goods then being purchased by her son, and that she understood that she was giving the note for goods so then being purchased only and that the appellee, the payee, who presented the note for her signature in the absence of her said son, knew that the appellant was thus misinformed concerning the consideration, and did not inform her that the amount of the note included the pre-existing debt, but concealed that fact from her. We do not intend to intimate an opinion as to the preponderance of the evidence upon this question. This question of fraudulent concealment, and the question as to the appellant's suretyship were both before the jury for decision.

<sup>84</sup> If the appellant signed as a surety, although she must be held bound to know the amount of the note which she signed without any misrepresentation or concealment on the part of the payee concerning the contents of the note, yet if



she believed she was giving the note for its full amount for goods then purchased by her son from the payee, and the payee knew this to be her belief, it was his duty to inform her that it included the pre-existing debt, and the failure to perform this duty was in law a fraud upon the surety which would release her from the entire contract.

In *Warren v. Branch*, 15 W. Va. 21, 35, the court concluded that unless inquired of by the surety, a creditor is under no obligation to disclose facts in no manner connected with the business which is the subject of the suretyship, though such facts would probably have a decided influence on the surety in entering into or deciding to enter into his contract of suretyship; but that if a material fact connected with the contract of suretyship which might influence the surety in entering into the contract, is fraudulently concealed with a view to benefit the creditor, such concealment, though no inquiry has been made by the surety, would vitiate the contract of suretyship, and discharge the surety.

In *Franklin Bank v. Cooper*, 36 Me. 179, it was said: "To receive a surety known to be acting upon the belief that there are no unusual circumstances by which his risk will be materially increased, well knowing that there are such circumstances, and having a suitable opportunity to make them known, and withholding them, must be regarded as a legal fraud, by which the surety will be relieved from his contract."

It was held in this case that the bond of a bank cashier, framed to cover past as well as future delinquencies, would be invalid against a surety if his name was procured at the desire of the directors, they knowing <sup>85</sup> that past defalcations existed, of which he was ignorant, and withholding the knowledge from him, though with a suitable opportunity to communicate it.

In *Doughty v. Savage*, 28 Conn. 146, 155, it is said: "It is a clear and well settled principle that a security given by a surety is voidable on the ground of fraud, if there is, with the knowledge or assent of the creditor, such misrepresentation to, or concealment from the surety, of the transaction between the creditor and his debtor, that, but for the same having taken place, either the suretyship would not have been entered into at all, or being entered into, the extent of the surety's liability might be thereby increased": See, also, *Farmers' Nat. Bank v. Van Slyke*, 49 Hun, 7; *Ham v. Greve*, 34 Ind. 18; *Taylor v. Lohman*, 74 Ind. 418; *Wilson v. Monticello*, 85 Ind. 10, 17; *Lucas v. Owens*, 113 Ind. 521; *Springfield etc. Co. v. Park*, 3 Ind. App. 173; *Brandt on Suretyship and Guaranty*, sec. 419.

Thus it was a material question whether the note was signed by the appellant as principal or as surety.

The court in one of its instructions told the jury that if the note in suit "is a perfect note on its face, this is a strong inference that the party signing the same did so as principal, and not otherwise."

This instruction was erroneous. It invaded the province of the jury; inasmuch as it is for the jury, and not for the judge, to draw inferences of fact from the evidence, and to pass upon the weight or strength of evidence from which inferences of fact are to be drawn: *Union etc. Ins. Co. v. Buchanan*, 100 Ind. 63; *Wood v. Deutchman*, 75 Ind. 148; *Huffman v. Cauble*, 86 Ind. 591; *Louisville etc. Ry. Co. v. Falvey*, 104 Ind. 409; *Pancake v. State*, 81 Ind. 93; *Story v. State*, 99 Ind. 413; *Home Ins. Co. v. Marple*, 1 Ind. App. 411.

<sup>86</sup> For this error the judgment is reversed, and the cause is remanded for a new trial.

#### ON PETITION FOR REHEARING.

BLACK, J. No question arose under the pleadings as to the effect of a promise, agreement, suggestion, or direction to procure the signature of the appellant's son to the note in suit.

If it was understood and agreed between the appellee and the appellant that the note was being given and accepted as a security for an indebtedness of the appellant's son to the appellee, then being contracted upon condition of the procurement of such security, then, whether it was or was not agreed that the son should sign the note, the appellant was entitled to the protection which the rules of law give to a surety, and she would be relieved by a fraudulent concealment as mentioned in our opinion upon the original hearing.

As between her and the payee, she might sustain the relation of surety, and be entitled to be treated as surety, without the procurement of the son's signature, and without any agreement for its procurement, while, as stated in our former opinion, the mere fact that she was a surety would not release her.

It was a disputed question, to be decided by the jury, whether or not she sustained the relation of surety.

If she was to be treated as a surety, and if there was such fraudulent concealment, then she was not merely entitled to be credited with the amount of the pre-existing debt included in the amount of the note, but there could be no recovery against her for any amount.

While the form of the note was a proper matter for the consideration of the jury in determining the question of suretyship, the weight of the evidence should have been left to be determined by the jury.

**SURETYSHIP—BOND NOT SIGNED BY PRINCIPAL.**—A bond not signed by the principal is void as to him, and *prima facie* invalid as to persons signing as sureties. The burden of proving its validity as to the sureties is upon the obligee: *Gay v. Murphy*, 134 Mo. 98; 56 Am. St. Rep. 496, and note. See *Woodman v. Calkins*, 13 Mont. 363; 40 Am. St. Rep. 449, and note.

**SURETYSHIP—CONSTRUCTION OF CONTRACT—RELEASE BY FRAUD OR CONCEALMENT.**—A surety is entitled to stand upon the strict terms of his contract: *Monographic note to First Nat. Bank v. Gerke*, 6 Am. St. Rep. 459. When a creditor enters into any valid contract with the principal debtor, without the assent of the surety, by which the rights or liabilities of the surety are injuriously affected, such contract discharges the surety: *Scott v. Fisher*, 110 N. C. 311; 28 Am. St. Rep. 688, and extended note. As to what concealment of facts from the surety will release him, see *Bryant v. Crosby*, 36 Me. 562; 58 Am. Dec. 767.

**What Matters Existing at or Prior to Entering into a Contract of Surety or Guaranty will Discharge the Surety or Guarantor.**

It is a well-settled rule of law that if a creditor induces a surety or guarantor to enter into the contract of suretyship or guaranty by any fraudulent concealment or misrepresentation of material facts, that the surety or grantor will be released: *Anderson v. Bellinger*, 87 Ala. 334; 13 Am. St. Rep. 46; *Guardian Fire etc. Ins. Co. v. Thompson*, 68 Cal. 208; *Doughty v. Savage*, 28 Conn. 146; *Phoenix Mut. Life Ins. Co. v. Holloway*, 51 Conn. 311; 50 Am. Rep. 20; *Holliday v. Poole*, 77 Ga. 159; *Easter v. Minard*, 26 Ill. 494; *Comstock v. Gage*, 91 Ill. 328; *Drabek v. Grand Lodge*, 24 Ill. App. 82; *Johnson v. Lawson*, 29 Ill. App. 146; *Ham v. Greve*, 34 Ind. 18; *Fishburn v. Jones*, 37 Ind. 119; *Wilson v. Monticello*, 85 Ind. 10; *Armstrong v. Cook*, 30 Ind. 22; *Springfield etc. Co. v. Park*, 3 Ind. App. 173; *Conger v. Bean*, 58 Iowa, 321; *Bank of Monroe v. Anderson Bros. etc. Co.*, 65 Iowa, 692; *Bank of Monroe v. Gifford*, 72 Iowa, 750; *Connecticut Mut. Life Ins. Co. v. Scott*, 81 Ky. 540; *Wooley v. Louisville etc. Co.*, 81 Ky. 527; *State v. Dunn*, 11 La. Ann. 549; *Reusch v. Keenan*, 42 La. Ann. 419; *Franklin Bank v. Cooper*, 36 Me. 179; *Bryant v. Crosby*, 36 Me. 562; 58 Am. Dec. 767; *Franklin Bank v. Stevens*, 39 Me. 532; *Waterbury v. Andrews*, 67 Mich. 281; *Home Sav. Bank v. Traube*, 6 Mo. App. 221; *Harrison v. Lumberman's etc. Co.*, 8 Mo. App. 37; *Mendleson v. Stout*, 37 N. Y. Sup. Ct. 408; *Coleman v. Bean*, 3 Keyes, 94; *Putnam v. Schyler*, 4 Hun. 166; *Farmers' Nat. Bank v. Van Slyke*, 49 Hun. 7; *McWilliams v. Mason*, 31 N. Y. 294; *Vose v. Florida R. R. Co.*, 50 N. Y. 369; *Frisch v. Miller*, 5 Pa. St. 310; *Reed v. Garvin*, 12 Serg. & R. 100; *Wayne v. Commercial Nat. Bank*, 52 Pa. St. 343; *Hawkins v. Humble*, 5 Cold. 531; *Trammell v. Swan*, 25 Tex. 474; *Jungk v. Holbrook*, 15 Utah, 199; 62 Am. St. Rep. 921; *Remington Sewing-Machine Co. v. Kezertee*, 49 Wis. 409; *Gillet v. Whitmarsh*,



9 Q. R. 966; Wason v. Warling, 15 Beav. 151; Espey v. Lake, 16 Jur. 1106; Allen v. Inman, 7 Jur. 433; Pledge v. Buss, 6 Jur., N. S., 695; Oakley v. Pasheller, 4 Clark & F. 207; Molson's Bank v. Turley, 8 Ont. 293; Cashin v. Perth, 7 Grant U. C. 340. But if the misrepresentation or concealment is made by the principal or a stranger, without the payee's knowledge, the surety or guarantor will not be released: Lucas v. Owens, 113 Ind. 521; Home Ins. Co. v. Holway, 55 Iowa, 571; 39 Am. Rep. 179; Young v. Ward, 21 Ill. 223; Ladd v. Trustees, 80 Ill. 233; Anderson v. Warne, 71 Ill. 20; 22 Am. Rep. 83; Davis Sewing-Machine Co. v. Buckles, 89 Ill. 237; Brown v. Davenport, 76 Ga. 799; Graves v. Tucker, 10 Smedes & M. 9; Sooy v. State, 39 N. J. L. 135; Griffith v. Reynolds, 4 Gratt, 46; Quinn v. Hard, 43 Vt. 375; 5 Am. Rep. 284; George v. Tate, 102 U. S. 564; Western New York Life Ins. Co. v. Clinton, 66 N. Y. 326; Dair v. United States, 16 Wall. 1; Mason Lumber Co. v. Buchtel, 101 U. S. 633; Wallace v. Wilder, 13 Fed. Rep. 707; Ryan v. United States, 19 Wall. 514; United States v. Girault, 11 How. 22; Cobbet v. Brock, 20 Beav. 524. The question then is, What are the facts or the matters that are so material that their concealment or misrepresentation will release a surety or guarantor? The question is first presented with decisions stating in general what constitutes a fraudulent misrepresentation or concealment. In Smith v. Bank of Scotland, and Mallby's case, 1 Dow, 272, there was a considerable deficit in the accounts of the agent when additional security was obtained. Lord Eldon thus stated the law: "If one knew himself to be cheated by an agent, and concealing that fact, applied for security, in such a manner, and under such circumstances, as held him out to others as one whom he considered as a trustworthy person, and any one, acting under the impression that the agent was so considered by his employer, had become bound for him; it appeared to him that he could not hold the surety." In Stone v. Compton, 5 Bing. N. C. 142, where an old debt was included in the security, by misrepresentation that it had been paid, the court held that when, with the knowledge and assent of the creditor, there is a misrepresentation with regard to a material fact, which had it been known, might reasonably have prevented the surety from entering into his contract, such contract will not be binding on the surety, though such misrepresentation was not made with a fraudulent purpose. In Cooper v. Joel, 1 De Gex, F. & J. 240, a surety gave a written guarantee for the payment of several judgments, the creditors consenting, as they supposed they had a right to do, to postpone the sale of the debtor's property. They had no right to make such consent, without the concurrence of a third party, and the sale was made. It was held that the surety was not bound by the guarantee. In Rallton v. Matthews, 10 Clark & F. 934, one Hicks had been agent for the firm of Matthews and Leonard. Upon dissolution of the firm, he was reappointed agent with his brother and Rallton as security for the faithful performance of his duties. He misappropriated funds and Rallton asked to have his suretyship voided because Matthews and Leonard had fraudulently suppressed the fact that

when formerly their agent, he had been guilty of gross irregularities, owed a balance to them on his former agency, and was untrustworthy to their knowledge. Upon the trial of the issue whether Railton was induced to sign the bond by undue concealment or deception on the part of Matthews and Leonard, the following charge was given, but on appeal the house of lords held it to be erroneous: "That under this issue the concealment must be: 1. Of things known to Matthews and Leonard, or which they had strong and grave grounds to suspect; and 2. That the concealment being undue must be willful and intentional, with a view to the advantage they were thereby to receive." In the decision upon appeal Lord Campbell said: "If the defendants had facts within their knowledge, which it was material the surety should be acquainted with, and which the defendants did not disclose, in my opinion, the concealment of those facts, the undue concealment of those facts, discharges the surety; and whether they concealed those facts from one motive or another, I apprehend is wholly immaterial." Lord Collenham in the same case said: "In my opinion there may be a case of improper concealment or noncommunication of facts, which ought to be communicated, which would affect the situation of the parties, even if it were not willful and intentional, and with a view to the advantage the parties were to receive." The position taken by Lord Campbell in *Railton v. Matthews*, 10 Clark & F. 934, that the intent of the creditor in not communicating the facts to the surety is in all cases wholly immaterial, is not sustained by other cases, though there are many in which it is held that creditor must use entire good faith. His position is weakened by the decision in *Hamilton v. Watson*, 12 Clark & F. 108, where it was held that an obligation to a banker by a third party to be responsible for a cash credit to be given to one of the bank's customers, is not avoided by the fact that immediately after the execution of the bond, the cash credit was used to pay off an old debt due the banker. This case was decided specially on the ground that no fraud was averred, and the circumstances were not so stated in the pleadings as to raise the inference of fraud or deception, nor was there an allegation that the payment of the old debt was in accordance with a previous agreement. Lord Campbell in this case said: "No bankers would rest satisfied that they had security for advances made, if, as it is contended, it is essentially necessary that everything should be disclosed that is material for the surety to know. If such were the rule, it would be indispensably necessary for the bankers, to whom the security is to be given, to state how the account has been kept; whether the debtor was in the habit of overdrawn; whether he was punctual in his dealings; whether he performed his duties in an honorable manner—for all these things are extremely material for the surety to know. But unless questions be particularly put by the surety to get this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any disclosures. In the case of *Pidcock v. Bishop*, 3 Barn. & C. 605, where there was an agreement between vendors and



vendees of goods that the latter should pay ten shillings a ton above the market price, which ten shillings were to go toward the payment of an old debt, and the payment of the goods was guaranteed by a third person, ignorant of the agreement for the payment of the extra ten shillings, it was held that this noncommunication was a fraud releasing the surety. In the *North British Ins. Co. v. Lloyd*, 10 Ex. 522, the brother of a debtor withdrew his guarantee, and the debtor then procured another guarantor without there being disclosed the fact of the withdrawal of the debtor's brother. The court said: "The nondisclosure of the charge of security, even if it had been material, would not have vitiated the guarantee, unless it had been fraudulently kept back," and further: "The rule that prevails in insurance on ships and lives, that all material circumstances known to the assured must be disclosed, though there is no fraud in the concealment, does not extend to the case of a guarantee. In the latter case, the concealment, to vitiate the guarantee, must be fraudulent." In this same case the court, in considering *Smith v. Bank of Scotland*, 1 Dow, 272, says that case was decided on the ground that the representation to the surety of the trustworthiness of the principal, known or believed by the bank to be untrue, was fraud. In considering the decision in *Railton v. Matthews*, 10 Clark & F. 934, they held that it is not necessary that a concealment be made with a view to the advantage of the person making it to render it fraudulent. The decision in this case (*North British Ins. Co. v. Lloyd*, 10 Ex. 523) was contrary to, and disapproved the decision in, *Owen v. Homan*, 3 Macn. & G. 378, where defendant was surety on notes of a certain firm who were heavily indebted, at the time of the execution of the various contracts of suretyship, to plaintiffs, the payees, who concealed the indebtedness from her. The court said the principles that govern insurance apply to sureties, and the creditor must make a full, fair, and honest communication to the surety of all circumstances connected with the transaction to which the suretyship is to be applied, which are calculated to influence the discretion of the surety in entering into the required obligation.

In that case, when brought before the house of lords (*Owen v. Homan*, 4 H. L. Cas. 1035), the position of the chancery court was not sustained. In the house of lords the law is thus stated: "Without saying in every case that the creditor is bound to inquire under what circumstances his debtor has obtained the concurrence of a security, it may safely be stated, that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used, in order to obtain such concurrence, he is bound to make inquiry, and cannot shelter himself under the plea that he was not called upon to ask, and did not ask, any questions on the subject. In some cases willful ignorance is not to be distinguished from willful knowledge. If a person abstains from inquiry because he suspects inquiry will probably show that the transaction in which he is engaging is tainted with fraud, his want of knowledge of the fraud will afford no excuse." The position of the judges in *North British Ins. Co. v. Lloyd*, 10 Ex. 523, to the effect that



the rule relative to insurance is not applicable to sureties is sustained in the decision in *British Emp. etc. Assn. v. Luxton*, 9 Man. & G. 169. When parties are contracting, either of them, unless he is under a duty to the other, may keep silent, even as to facts which he believes would be operative upon the mind of the other; if, however, one of them has made a statement which he believes to be true, but which in the course of the negotiation he discovers to be false, he is bound to correct his erroneous statement. In some cases there is a duty to make an entire disclosure; in others all material facts must be disclosed. There is no such duty in the case of a contract of suretyship, but very little said which ought not to have been said, and very little omitted which ought to have been said, will suffice to avoid a contract. The officers of a company believing that acts of the agent amounted to a felony, ordered his arrest. Certain friends of the agent proposed to deposit a sum as security for the deficiency. The officers learned that the act did not constitute a felony and withdrew the order for arrest. Without mentioning the fact of the acts not constituting a felony or the withdrawal of the order of arrest, the officers subsequent thereto, accepted the deposit as a security for the agent's defaults. Held, that the change of circumstances ought to have been stated to the intending sureties, and that the sureties were released: *Davies v. London etc. Marine Ins. Co.*, L. R. 8 Ch. Div. 469. In *Willis v. Willis*, 17 Sim. 218, Willis, in consideration of a conveyance to his principal of certain property free from all encumbrances, became his surety for the payment of the purchase price. It turned out that the property was subject to another encumbrance not specified, which the grantor, at that time, had forgotten, and this encumbrance was unknown to the surety. This misrepresentation was held to render the contract invalid as to the surety. A surety is a favored debtor. The slightest fraud on the part of the creditor touching a contract annuls it. The surety must be diligent in seeking information. The mere relation between principal and surety does not require the voluntary disclosure of all the material facts in all cases. The creditor is not bound to inform the intended surety of matters affecting the credit of the debtor, or of any circumstances unconnected with the transaction: *Magee v. Manhattan Life Ins. Co.*, 92 U. S. 93. In *Franklin Bank v. Cooper*, 36 Me. 179, it was held where a bond of a cashier was framed to cover past as well as future delinquencies, that it would be invalid against a security, if his name was procured at the desire of the directors they knowing that past delinquencies existed of which he was ignorant, and withholding the knowledge from him, though with a suitable opportunity to communicate it. And the law in general was stated to be that to accept a surety known to be acting under the belief that there was no unusual circumstances by which the risk will be materially increased, while the party thus accepting knows that there are such circumstances and withholds the knowledge of them from the surety, though having a suitable opportunity to communicate them, is a legal fraud which discharges the surety.

In the case of *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep. 231, where a cashier had, shortly before giving the bond, lost money by gambling, which the directors knew, and in consequence thereof increased his bond, and required additional security, it was decided that the sureties, to avoid their liability on the bond, must show, on the part of the directors, a fraudulent concealment of facts material for the surety to know. The noncommunication of the gambling did not discharge the surety. The court said: "We think it is going too far to say that the creditor is in all cases, and without being inquired of, bound to communicate, everything that is important for the surety to know, and that would increase his risk. Under such a rule no one would ever know when he could rely on a bond, and it would lead to a great deal of litigation. We think the safe rule is, that to avoid the bond, there must be on the part of the creditor a fraudulent concealment of something material for the surety to know." And further, "If there had been an actual default, and an attempt by the directors to cover it up, or reimburse themselves at the expense of the surety, the case would be different. Moreover, the cases which we have referred to (*Railton v. Matthews*, 10 Clark & F. 934; *Hamilton v. Watson*, 12 Clark & F. 109; *North British Ins. Co. v. Lloyd*, 10 Ex. 523; *Franklin Bank v. Cooper*, 36 Me. 179) are cases in which the information withheld, or not disclosed, related in some way to the business which was the subject of the suretyship. In this case the undisclosed information related not to the business which was the subject of the suretyship, and not to the conduct of the cashier as cashier, but to his general character. It did not follow because he gambled he would fail in his duty as cashier." In *Warren v. Branch*, 15 W. Va. 21, after a careful consideration of the leading cases, the court stated the law as follows: "Unless inquired of by the surety, the creditor is under no obligation to disclose facts in no manner connected with the business which is the subject of the suretyship, though such facts would have a decided influence on the surety in entering into, or declining to enter into, his contract of suretyship. As for example, in the taking of the bond of a cashier, the fact that he gambled largely might, and probably would, influence a surety in going on his bond, yet such fact not being in any way connected with the contract that he would faithfully perform his duties as cashier, the directors are under no obligation to volunteer a disclosure of this fact to the surety. So, too, the insolvency of the principal need not, though known to the creditor, be disclosed to the surety, when no inquiry is made by him. If a material fact connected with the contract of suretyship, which might influence the surety in entering into a contract, is fraudulently concealed with a view to benefit the creditor, such concealment, though no inquiry has been made by the surety, would vitiate the contract and discharge the surety. As for instance, the contract which is entered into is for money borrowed by the principal, and there is an agreement between the principal and the creditor that the whole, or a large part, of the money so borrowed is to be applied to an old debt due the creditor, and this agreement is designedly

concealed from the surety by the creditor, under the belief that he would not sign the bond as security if this was disclosed to him, such concealment, induced by such motives, would be a fraud on the surety and would vitiate the contract. But if the surety made no inquiry on the subject and the failure to disclose the fact, that the money borrowed or a portion of it was to be applied to the payment of an old debt due the creditor, was not induced by the belief on the part of the creditor that, if he disclosed, he would not sign the bond as a surety, then such failure to communicate this fact, not being fraudulent, does not avoid the contract, and the surety will be bound.

"The contract of suretyship, as a general rule, is for the benefit of the creditor, while the surety derives no advantage from it. Hence, the law imposes upon the creditor the duty of dealing with the surety, at every step of the transaction, with the utmost good faith. If the surety applies to him, before entering into the contract, for information touching any matter materially affecting the risk of the undertaking, he is bound, if he assumes to answer the inquiry at all, to give full information as to every fact within his knowledge, and he can do nothing to deceive or mislead the surety without vitiating the agreement. And whether he is bound, before accepting the undertaking of the surety, and without being applied to by him for information on the subject to inform him of facts within his knowledge which increase the risk of the undertaking, depends on the circumstances of the case. If there is nothing in the circumstances to indicate that the surety is being misled or deceived, or that he is entering into the contract in ignorance of facts materially affecting its risks, the creditor is not bound to seek him out, or, without being applied to, communicate facts within his knowledge. But in such cases he may assume that the surety has obtained information for his guidance from other sources, or that he has chosen to assume the risks of the undertaking whatever they may be."

But if he knows, or has good grounds for believing, that the surety is being deceived or misled, or that he was induced to enter into the contract in ignorance of facts materially increasing the risks, of which he has knowledge, and he has an opportunity, before accepting his undertaking, to inform him of such facts, good faith and fair dealing demand that he should make such disclosures to him; and if he accepts the contract without doing so, the surety may afterward avoid it: *Bank of Monroe v. Anderson Bros. etc. Ry. Co.*, 65 Iowa, 692. Citing *Pidcock v. Bishop*, 3 Barn. & C. 605; *Owen v. Homan*, 4 H. L. Cas. 997; *Rallton v. Matthews*, 10 Clark & F. 934; *Hamilton v. Watson*, 12 Clark & F. 109; *Franklin Bank v. Cooper*, 36 Me. 179; *Franklin Bank v. Stevens*, 39 Me. 532; *Graves v. Lebanon Bank*, 10 Bush, 23; 19 Am. Rep. 50; *Stone v. Compton*, 5 Bing. N. C. 142; *Booth v. Storrs*, 75 Ill. 438; *Ham v. Greve*, 34 Ind. 18.

There is some conflict of authority as to the extent of the obligation of one, who takes security for the faithful discharge of duty by one who enters his employment, to inform the surety of



any facts within his knowledge illustrative of the unfitness of the employé, resulting from habits or delinquencies, and as to the effect of the failure to give such information. The fact that security is required, of itself would seem to be a sufficient notification to one proposing to become surety that the obligee is not willing to trust solely to the skill, diligence, or honesty of the person of whom security is required, and it seems that to avoid a bond on the ground that the surety was not informed of facts known to the obligee, it should be shown that there was a fraudulent concealment or withholding of facts material for the surety to know.

Whether a failure by an obligee to disclose facts known to him may be deemed fraudulent, will depend largely upon the character of the fact concealed, and cases may arise in which it would be the duty of the obligee to disclose to a surety facts known to him, notwithstanding the surety may make no inquiry. If, in the course of the employment of the obligee, the person of whom security is asked, has been guilty of acts showing moral delinquency, and utter unfitness for trust, some of the cases hold that in such case information should be given to the surety whether asked for or not. If, however, the facts disclosed be not of this character, but such as are consistent with honesty, and may only tend to show that the person is negligent, dilatory, or unskilled, it may not be the duty of obligee unasked to give the surety information of such known facts: *Screwmen's etc. Assn. v. Smith*, 70 Tex. 168; *Atlas Bank v. Brownell*, 9 R. I. 169; 11 Am. Rep. 231; *Home Ins. Co. v. Holway*, 55 Iowa, 571; 39 Am. Rep. 179; *Charlotte etc. R. R. Co. v. Gow*, 59 Ga. 694; *Bostwick v. Van Voorhis*, 91 N. Y. 357; *Roper v. Trustees*, 91 Ill. 519; 33 Am. Rep. 60; *Aetna Life Ins. Co. v. Mabbett*, 18 Wis. 667.

It is difficult to determine what will constitute a material part of a transaction, in relation to which misrepresentation or concealment will be deemed fraudulent. To be material, it must be some fact or circumstance immediately affecting the liability of the surety, and bearing directly upon the particular transaction to which the suretyship attaches. There are many facts and circumstances, which may indirectly affect the liability of the surety, such as the skill or the want of it; the industry or indolence; the care or negligence; the wealth or poverty, of the party for whose faithfulness or responsibility a surety is sought, to which this rule will not apply. Such facts and circumstances are too remote to constitute elements to be deemed material in transactions of this kind, unless they are made such by particular inquiry and distinct representation. The effects which result from such personal qualities are matters for which the surety ordinarily assumes the responsibility: *Franklin Bank v. Stevens*, 39 Me. 532. And in that case, which was an action against the sureties on a cashier's bond, conditioned that he should account for moneys received before, as well as after its date, held that a misrepresentation or concealment as to any material part of the transaction, when the agents of the banks entered into the contract of suretyship would release the surety; but the facts that no bonds had been given in former years, that the directors had been negligent, that the accounts of the bank were in

a confused state; and that the bank commissioners had not discharged their duty relating to the bank, were not such material facts that their concealment would release the surety.

The decisions referred to and quoted indicate the impossibility of determining, in general, what are the material facts, of which the suppression, concealment, or misrepresentation will constitute fraud to discharge a surety or guarantor. Besides the different circumstances of the various transactions, the making or not making of inquiries by the surety, the ignorance of the creditor, there is much to vary the decisions, and prevent them from determining general rules as to what are such material facts as to void the contract of surety or guaranty. The cases may be best considered with reference to various subdivisions under which they can be gathered most conveniently.

1. *The Principal a Defaulter.*—A defalcation, misappropriation or failure to account for a previous indebtedness, existing at the time of the execution of contract of surety or guaranty, is matter that will release the surety or guarantor if unknown to him: Maltby's case, 1 Dow, 274; Smith v. Bank of Scotland, 1 Dow, 272; Railton v. Matthews, 10 Clark & F. 934; Lee v. Jones, 17 Com. B., N. S., 482; Cashin v. Perth, 7 Grant U. C. 340; Peers v. Oxford, 17 Grant U. C. 472; Phillips v. Foxhall, L. R. 7 Q. B. 666; Gananoque v. Stunden, 1 Ont. 1; Guardian etc. Life Ins. Co. v. Thompson, 68 Cal. 208; Fishburn v. Jones, 37 Ind. 119; Diabek v. Grand Lodge, 24 Ill. App. 82; Connecticut Life Ins. Co. v. Scott, 81 Ky. 540; Franklin Bank v. Cooper, 36 Me. 179; Franklin Bank v. Stevens, 39 Me. 532; Harrison v. Lumberman's etc. Ins. Co., 8 Mo. App. 37; Wayne v. Commercial Nat. Bank, 52 Pa. St. 343; Farmers Nat. Bank v. Van Slyke, 49 Hun, 7; Wilmington etc. R. R. Co. v. Ling, 18 S. C. 116; Remington Sewing-Machine Co. v. Kezertee, 49 Wis. 409; Wilson v. Monticello, 85 Ind. 10; Magee v. Manhattan etc. Co., 92 U. S. 93. If the previous defalcation was unknown to the payee, the surety is not discharged: State v. Dunn, 11 La. Ann. 549; Tapley v. Martin, 116 Mass. 275; Amherst Bank v. Root, 2 Met. 522; Farmington v. Stanley, 60 Me. 472; Howe Sewing-Machine Co. v. Farrington, 82 N. Y. 121; Home Ins. Co. v. Holway, 55 Iowa, 571; 39 Am. Rep. 179; Domestic etc. Co. v. Jackson, 15 Lea, 418; Bostwick v. Van Voorhis, 91 N. Y. 353; Screwmen's etc. Assn. v. Smith, 70 Tex. 168; Aetna Life Ins. Co. v. Mabbett, 18 Wis. 667; Wayne v. Commercial Nat. Bank, 52 Pa. St. 343; State v. Atherton, 40 Mo. 209. Where principal was grossly irregular and in arrears in the payment of his rent, the concealment of these facts is not sufficient to release the surety who subsequently guaranteed the payment of rent; Roper v. Cox, L. R. 10 Q. B. 200. Concealment from sureties on an official bond, without retrospective words, of the previous defalcation of the principal is immaterial and does not render the bond void: United States v. Boyd, 5 How. 29. Where the records of the auditor's and of the treasurer's offices are open to the public, and the sureties might have inquired as to sheriff's accounts, ignorance of a previous defalcation does not release the sureties on a sheriff's bond: State v. Dunn, 11 La. Ann. 549.



In *Lee v. Jones*, 17 Com. B., N. S., 482, the majority of the judges in the exchequer chamber held that a concealment by the creditor that at the time of the contract the principal debtor was already indebted to the creditor in a considerable amount, of which the surety was ignorant, was evidence to give to the jury of such a fraud as would discharge the surety from liability. And in *Phillips v. Foxhall*, L. R. 7 Q. B. 666, in considering a case of continuing guarantee, the court, after reviewing the decisions relating to the concealment of matter before the execution of the bond, stated that where a servant had previously committed defalcations, and had agreed to repay them, and this fact had been concealed by the master from the surety, it would be a fraud to discharge the surety. And the rule in general is thus stated: "We cannot doubt but that previous acts of dishonesty by the servant in the same service, known to the master, would be such a fact, if concealed from the surety as would avoid the contract." There is a broad distinction between a case of embezzlement and a case where it simply appears that the agent is behind in his accounts. Knowledge on the part of the employer of dishonesty and corruption of his agent, without disclosure, would amount to a fraudulent concealment, but a falling behind in current accounts by an agent is not always the result of dishonesty, and the failure of an employer to inform the surety at the time he executes the bond, that the agent is behind in his accounts, is not such a fraudulent concealment of material facts as would discharge the sureties. Yet if the employer, knowing that such agent was in default and indebted in his pre-existing agency, concealed the fact, and held him out to the sureties as trustworthy, either expressly or impliedly, such conduct would be a fraud on the sureties, and would discharge them: *Wilmington etc. R. R. Co. v. Ling*, 18 S. C. 116. To accept a surety knowing him to be acting upon a belief that there are no unusual circumstances by which the risk will be materially increased, while the creditor knows that there are such circumstances, and withholds the knowledge of them from the surety, though having a suitable opportunity to communicate them, is a legal fraud which discharges the surety. The bond of a bank cashier framed to cover past, as well as future, delinquencies, will be invalid against a surety, if his name was procured, at the desire of the directors, they knowing that past defalcations existed of which he was ignorant, and withholding the knowledge from him: *Franklin Bank v. Cooper*, 36 Me. 179. Citing *Pidcock v. Bishop*, 3 Barn. & C. 605; *Smith v. Bank of Scotland*, 1 Dow, 294; *Stone v. Compton*, 5 Bing. N. C. 142.

"There can be no doubt, either on principle or authority, that when an agent has acted dishonestly in his employment, the principal, with knowledge of the fact, cannot accept a guaranty for his future honesty from one who is ignorant of the agent's dishonesty, and to whom the agent is held out as a person worthy of confidence. The failure to communicate such knowledge, under such circumstances, would be a fraud upon the guarantor. The bad faith in withholding from the guarantor such information, so material to the risk as-



sumed, is manifested not only by the fact that the dishonest character of the agent was peculiarly within the knowledge of the principal, but the holding of him out as a person entitled to confidence, by continuing him in the service, was equivalent to a declaration that the principal had no knowledge of the dishonesty of the agent": *Dinsmore v. Tidball*, 34 Ohio St. 418; *Guardian Fire etc. Ins. Co. v. Thompson*, 68 Cal. 208. The directors of the bank published, according to law, a statement of the condition of the bank, from which it appeared that the affairs of the bank were being honestly administered, and which had a tendency to inspire the public with confidence in the officers of the bank, to disarm suspicion, and to prevent inquiry. The presumption was that the directors had informed themselves of the affairs of the bank. They held out to others, ignorantly, though it may be, as trustworthy, a man who had been guilty of repeated embezzlements and frauds, all of which might have been discovered by the exercise of slight diligence. After publication of the report, certain parties became sureties on the bond of the cashier, who had had no previous bond; and who, unknown to the directors, was guilty of fraud and embezzlement. The sureties were sought to be held for subsequent embezzlements of the cashier. Held that the sureties were released by the misrepresentation of the directors. If the sureties had known the truth, they would not have signed: *Graves v. Lebanon Nat. Bank*, 10 Bush, 23; 19 Am. Rep. 50. A county treasurer had for many years been allowed to mix the public money with his own, and had used for his personal purposes a large amount of public money. Under these circumstances, he gave a new bond with two sureties. After the bond was executed, it was ascertained that he could not pay the balance due the county. The fact of his mingling the public money with his own being generally known, and being known to the sureties, the court held that no information was withheld fraudulently, and that to invalidate a bond on the ground of concealment of material fact, it must appear that the concealment was fraudulent: *Peers v. Oxford*, 17 Grant U. C. 472, and *East Zorra v. Douglas*, 17 Grant U. C. 462. Sureties on official bonds are not discharged by fraud or default on part of principal, or failure on part of government to inform: *Hallettsville v. Long*, 11 Tex. Civ. App. 180; *Detroit v. Weber*, 26 Mich. 284; *Bower v. Commissioners*, 25 Pa. St. 69; *State v. Bates*, 36 Vt. 390; *Ryan v. United States*, 19 Wall. 514; *Osborne v. United States*, 19 Wall. 577; *Farrar v. United States*, 5 Pet. 373; *United States v. Boyd*, 5 How. 29. In *Atlas Bank v. Brownell*, 9 R. I. 168; 71 Am. Rep. 231, where additional security was taken on account of the gambling of the cashier, the fact that the gambling was not disclosed did not release the surety. The undisclosed information related not to the business which was the subject of the transaction, and not to the conduct of the cashier as cashier, but to his general character. And to the same effect is *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, citing *Andrus v. Bealls*, 9 Cow. 693. A failure to communicate failure of duty of an officer, or his default or untrustworthiness, does not release the surety unless it was with intent to conceal, or through culpable negligence: *Anahelm etc. Wa-*

ter Co. v. Parker, 101 Cal. 483; Aetna Life Ins. Co. v. Mabbett, 18 Wis. 698; Guardian's etc. v. Strother, 22 L. T. 84; Atlantic etc. Co. v. Barnes, 64 N. Y. 385; 21 Am. Rep. 621; Atlas Bank v. Brownell, 9 R. I. 168; 11 Am. Rep. 231.

A secret agreement between principal and payee is a fraud which will release the surety or guarantor: Pendlebury v. Walker, 4 Younge & C. 424; Pidcock v. Bishop, 3 Barn. & C. 605; Peck v. Durrett, 9 Dana, 486; Comstock v. Gage, 91 Ill. 328; Springfield etc. Co. v. Park, 3 Ind. App. 173. And in Jungk v. Holbrook, 15 Utah, 199, 62 Am. St. Rep. 921, a concealment of a secret partnership of S., an agent of the principal, with the payee was a fraud to release the surety. Taking a bond for a discharge upon "ne exeat" which makes surety liable for judgment, but which he believes to be only for the appearance of the defendant, under a secret agreement with defendant (the principal) that it is to secure the amount adjudged due, is fraud to release the surety: Griswold v. Hazard, 141 U. S. 260. In Phoenix Mut. Life Ins. Co. v. Holloway, 51 Conn. 311, 50 Am. Rep. 20, an agreement, not to enforce a collateral security, made after sureties had signed, and without their knowledge, was held not to release the sureties.

Insolvency of the principal is held not to be matter to discharge the surety: Bank of Monroe v. Gifford, 72 Iowa, 750; Hand v. Greve, 34 Ind. 18; Roper v. Sangamon Lodge, 91 Ill. 518; 33 Am. Rep. 60. A previous indebtedness, unknown to the security, included in the amount secured, is a material fact releasing a surety: Stone v. Compton, 5 Bing. 142; Pidcock v. Bishop; 3 Barn. & C. 605; Hamilton v. Watson, 12 Clark & F. 109; Wason v. Waring, 15 Beav. 151; Doughty etc. v. Savage, 28 Conn. 146; Comstock v. Gage, 91 Ill. 328; Owen v. Homan, 3 Macn. & G. 378; Warren v. Branch, 15 W. Va. 21. But in Hamilton v. Watson, 12 Clark & F. 109, where there was no fraud, and where the surety is not injured, the concealment of an old debt does not discharge the surety. And to the same effect is Wythes v. Labouchere, 3 De Gex & J. 593.

Misrepresentation by the payee as to who was or would be a co-surety or coguarantor is matter constituting fraud to release the surety or guarantor: Holliday v. Poole, 77 Ga. 159; Easter v. Minard, 26 Ill. 494; Conger v. Bean, 58 Iowa, 321; Farmers' Nat. Bank v. Van Slyke, 49 Hun. 7; Anderson v. Bellenger, 87 Ala. 334; 13 Am. St. Rep. 46. But misrepresentation by principal to this effect, that others would sign as cosureties, does not avoid a note: Young v. Ward, 21 Ill. 223. Misrepresentation as to collateral security by the payee is sufficient to release the security: Wooley v. Louisville Banking Co., 81 Ky. 527; Marchman v. Robertson, 77 Ga. 41. And also if the nature, extent, or profits of a business are misrepresented to a surety to obtain his signature, the surety will be released: Mendleson v. Stout, 37 N. Y. Sup. Ct. 408; Trammell v. Swan, 25 Tex. 473; Blest v. Brown, 4 De Gex, F. & J. 367; Municipal Council v. Peters, 9 U. C. C. P. 205; Home Sav. Bank v. Traube, 6 Mo. App. 221.

## BRUNNER v. CENTRAL GLASS COMPANY.

[18 INDIANA APPEALS, 174.]

**RECEIVERS.—PARTIES DEALING WITH RECEIVERS MUST KNOW THEIR LIMITED POWERS** and that they are subject to the power creating them.

**RECEIVERS—CORPORATIONS' LIABILITY ON RECEIVER'S CONTRACTS.**—As a general rule, corporations are not subject to obligations or liabilities incurred by a receiver in charge of the corporate property.

**RECEIVERS, ENFORCEMENT OF CONTRACTS BY.**—The court will not allow a contractor to suffer loss for a contract made by receivers, but may refuse to direct its enforcement.

**RECEIVERS—INTEREST OF THE TRUST.**—The court will look rather to the interest of the trust than to that of the contractor.

**RECEIVER—DISCHARGE OF—LIABILITY OF PROPERTY FOR DEBT.**—The part of an order discharging a receiver, making the property liable for the receiver's debts, applies to such debts only as could be legally enforced.

**RECEIVERS—ACTION ON BREACH OF CONTRACT—ALLOWANCE OF CLAIM—DISCRETION OF COURT.**—When a trial court is invested with the discretion of allowing or disallowing a claim, in an action for a breach of contract of a receiver, it is not an abuse of discretion for the court to disallow a claim for more material than could be used in a certain time, and where the contract price was greater than the market price.

J. W. Lovett and H. C. Ryan, for the appellant.

Charles L. Henry, E. B. McMahan, and J. A. Van Osdol, for the appellee.

**175 COMSTOCK, J.** This action was instituted in the court below by the appellant to recover damages from the appellee for the breach of a contract entered into between appellant and one James S. Corsant, as receiver of appellee, under an appointment by the circuit court of Madison county. Judgment below for appellee. The only error assigned is the overruling of appellant's motion for a new trial.

The receiver contracted with appellant to purchase of said company two hundred tons of alkali for use in carrying on the business of his trust, to be delivered as needed, upon notice of the receiver, between November 15, 1893, and September 15, 1894. Of this amount, one hundred and forty-two tons were received and paid for. This suit is brought to recover damages alleged to have been sustained by the refusal of the receiver to accept the balance.

Before entering into the contract, the receiver had not asked for nor obtained the approval of the court of the same. Under the order of his appointment he was authorized to continue



the business of appellee, to run and operate its factory, and to purchase all necessary supplies and materials, and employ hands for that purpose. Those dealing with a receiver are bound to know that he possesses limited powers, and is constantly subject to the orders of the power which created him. They must, also, be held to know that he can make no contract effectual against the trust which was not first authorized, or subsequently ratified by the court.

In *Lehigh Coal etc. Co. v. Central R. R. Co.*, 35 N. J. 170 Eq. 426, a suit in which the petitioners show that orders were issued to them by the purchasing agent of the receiver of the railroad for cross-ties and lumber to a large amount; that a part of the order had been filled and pay therefor received; that the former receiver had died; that the balance ordered had been offered to and refused by the present receivers. They asked that the present receivers be directed to accept and pay for the material offered and directed to receive that which should thereafter be offered under said order. The petition was dismissed. The court said: "They were at liberty to decline to contract until such authority was obtained. . . . If they chose to act without adopting such precautions as were necessary to insure against loss, they must be understood as having deliberately assumed whatever risk attended their venture."

As a general rule, corporations cannot be subjected to obligations or liabilities incurred by the receiver or his agents or servants while in charge of the corporate property: *Heath v. Missouri etc. Ry. Co.*, 83 Mo. 617.

In the twentieth volume of *American and English Encyclopedia of Law*, pages 372 and 373, where a number of decisions are collected, it is stated that, while there is some uncertainty as to the extent to which the contracts of a receiver are binding upon the trust, the better opinion seems to be that, if the contract is not excessive or improvident, or if the contractor had no notice of such excessive or improvident character, the court will not allow the contractor to suffer actual loss in so far as the contract has been performed, although it may refuse to direct its enforcement. And this we believe to be a fair statement of the law.

Do the facts in the case at bar take it out of the general rule laid down in *Heath v. Missouri etc. Ry. Co.*, 83 Mo. 617?

<sup>177</sup> Appellant's learned counsel contend that the defendant corporation is bound, because the supplies contracted for were proper, the price agreed to be paid reasonable, the contract entered into in good faith, and the order discharging the receiver

and restoring the property of the estate to the defendant corporation made said restoration subject to the debts contracted by the receiver.

Under the order of appointment, the receiver had the right to apply money in his hands belonging to the trust at the time he entered on the discharge of his duties, or money received thereafter from its earnings, for such purposes as were necessary, in his judgment, within the purview of the order, to carry on the business, taking the risk, if any, that the court would approve his action. The order was not, we think, broad enough to authorize him to bind the trust by a contract for supplies for a period of ten months in advance, without the sanction of the court. Without such sanction, the court would be free to deal with it as it deemed just; to modify, approve, or disregard it entirely. It was in the power of the court to close up the receivership at any time, and the exercise of this discretion was not to be hampered by a contract of the receiver extending engagements for stated periods.

In its action, the court would look to the interest of the trust rather than to that of the contractor (appellant), who had chosen to act in the premises without adopting such precautions as were necessary to insure against loss: *Lehigh Coal etc. Co. v. Central R. R. Co.*, 35 N. J. Eq. 426.

That part of the order discharging the receiver which made the restoration of the property to the appellee company subject to the debts incurred by the receiver would apply only to such as could be legally enforced.

<sup>178</sup> The record does not disclose that the court which appointed and discharged the receiver had any knowledge of the contract in question. The final report of the receiver makes no mention of it. The order could not, therefore, have been intended to apply to it.

This is not an action to recover the value of merchandise received by the estate, and from which it would be presumed to have derived benefit. It was for the trial court, from all the evidence, to determine whether the claim in suit should be enforced against the trust property. There was evidence before the trial court that the amount of alkali contracted for was greater than could be used within the time named; that it could have been purchased for a price less than contracted for if it had been ordered as used. The court could reasonably, therefore, have held that the contract was not in the interests of the estate.

In *International etc. R. R. Co. v. Herndon*, 11 Tex. Civ. App. 465, a case in which an attorney was engaged by a receiver of the railroad as general solicitor at a stipulated annual salary, and who sought in a court, other than that by which the receiver was appointed, to enforce against the corporate property, a claim for balance of compensation under such contract. It was held that he must show that his claim was authorized or approved by the court which had control of the receiver, although he had received compensation under the contract from time to time from the receiver. The court said: "It would seem to follow that a party suing in another court to enforce a charge against the property should show that his claim, the validity of which, as such a charge, is dependent upon approval of the court which had control of the receiver, had been approved by that court, or had at least been authorized by it. . . . The duty of making allowances to the receiver and fixing the <sup>179</sup> expenditures properly chargeable to the fund necessarily belongs to the court whose officers the receivers are."

We do not deem it necessary to adopt the foregoing view for the purposes of this case, and hold that the present action would not lie upon the ground that it was brought in a court other than the one appointing the receiver, upon a contract not authorized by that court, but hold that the law invested the trial court with the discretion, under the facts of the case, to allow or disallow the claim of appellant, and we cannot say that it abused that discretion in disallowing it.

Judgment affirmed.

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**RECEIVERS—DEALINGS AND LIABILITIES—TREATMENT OF BY COURT.**—A receiver empowered to take possession of, control, and operate a railway is, in some sense, the representative of the corporation that owns it: *Howe v. Harding*, 76 Tex. 17; 18 Am. St. Rep. 17. As a general rule, he may do nothing to impair the fund in his hands, without an order of the court: *High on Receivers*, 3d ed., sec. 175. But receivers of railroads are authorized to make such contracts as are necessary to the proper conduct of the business put in their charge: *Gluck and Becker on Receivers of Corporations*, 2d ed., 214. He has no power to bind the trust by a contract involving large outlays, and which may extend beyond the life of the receivership: *Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554. And a person entering into a contract with a receiver is bound to take notice of his disability to contract, and makes a contract with him at his peril: *Tripp v. Boardman*, 49 Iowa, 410; *Ellis v. Little*, 27 Kan. 707; 41 Am. Rep. 434. See, also, *Barrett v. Henrietta Nat. Bank*, 78 Tex. 222. Courts of equity hold receivers to great strictness in rendering their accounts, and will not ratify expenses unnecessarily incurred: *High on Receivers*, secs. 797, 799; *Hooper v. Winston*, 24 Ill. 353. See *Howes v. Davis*, 4 Abb. Pr. 71.



**KALEN v. TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY.**

[18 INDIANA APPEALS, 202.]

**WILLFUL INJURY—COMPLAINT—NECESSARY AVERMENT.**—A complaint cannot proceed both as a complaint for negligence, and a complaint for willful injury. To be good for willful injury it must aver that the act was willfully and purposely done.

**DAMAGES—MENTAL ANGUISH—POLICY OF THE LAW.** While mental sufferings may be real, and the injuries resulting therefrom be properly regarded as naturally or directly resulting from the act causing the suffering as their proximate cause, still every injurious effect of wrong cannot form the basis of damages, and claims for redress on such grounds seem to be out of the wise policy of the law.

**DAMAGES, NOMINAL—REVERSAL OF JUDGMENT TO SECURE.**—Judgment will not be reversed to enable a party to recover nominal damages.

J. O. Piety and J. E. Piety, for the appellant.

T. J. Golden, McNutt & McNutt, for the appellee.

**202** **BLACK, J.** The complaint of the appellant against the appellee consisted of two paragraphs. A demurrer to each paragraph was sustained.

In the first paragraph, after introductory averments describing the appellee and its railroad, it was alleged, in substance, that where the appellee's road crosses Seventh street, in the corporation limits of the city of Terre Haute, the appellee, some time prior to the commission of the injuries in this paragraph complained <sup>203</sup> of, erected and maintained on either side of its tracks, at said crossing, gates, and had ever since maintained such gates; that for the purpose of raising and lowering said gates, and for other purposes, the appellee, prior to the commission of said injuries, stationed a watchman at said crossing; and that on or about the eighth day of June, 1895, the appellee was so maintaining said gates and had a watchman stationed at said crossing for the purpose aforesaid; that on or about that day, the appellant, in company with her husband and child, was traveling in a buggy drawn by one horse, along said Seventh street, and going north; that when they reached said crossing the gates were raised and not moving, and the crossing was open for travel; that said horse was being guided and driven by appellant's husband; that when she, so traveling, was in the act of going over and across said railroad tracks at said crossing, the appellee, by its agent, said watchman, carelessly and negligently let down and lowered said gate, so that it came

down in front and over said horse, and struck the buggy in which appellant was riding, causing said horse to become frightened and to rear, plunge, start, and run north on said street for a great distance, which street was then and there crowded with passengers and vehicles; that said buggy in which appellant was riding, while being drawn at a great and dangerous speed, as aforesaid, by said frightened horse, struck another vehicle with great force; that appellant was at the time carrying her infant child, which was about nine months old; that by reason of the appellee, by its agent, said watchman, wrongfully, carelessly, and negligently letting down and lowering said gates as aforesaid, which caused said horse to become frightened, to start, rear, plunge, and run as aforesaid, the appellant, without any fault on her part or on the part <sup>204</sup> of her said husband, received a severe nervous shock, was greatly frightened, and her life was put in great and imminent peril, danger, jeopardy, and, further, she has suffered great mental pain and anxiety; and that by reason of said injuries she has been damaged in the sum of two thousand dollars. Wherefore, etc.

The second paragraph is like the first, except that before the words "wrongfully, carelessly, and negligently," where first used, the words "willfully, unlawfully" are inserted, and where used the second time the word "willfully" is inserted.

The argument of counsel relates only to the averments concerning damages in the complaint.

In the second paragraph, the pleader, employing the same averments as to negligence as those used in the first paragraph, appears by the insertion of other words to have sought to frame a complaint for willful injury. A complaint should not proceed upon a purpose to make it good as a complaint for either an injury through negligence or a willful injury, or upon a purpose to make it good for an injury both willfully and negligently caused. It should proceed definitely upon one theory or the other; and, to be good as a complaint for willful injury, it should show by some consistent form of averment that the injurious act was purposely done with the intent on the part of the doer to inflict willfully and purposely the particular injury of which complaint is made: See Gregory v. Cleveland etc. R. R. Co., 112 Ind. 385.

The second paragraph must be treated as amounting to a complaint for negligence, like the first.

The right to damages for a tortuous injury is not dependent upon its having been inflicted purposely. The wrongdoer is

responsible for the consequences of his wrongful conduct; but in the case before us there is no question but one relating to compensatory damages, <sup>205</sup> and we may leave out of consideration not only cases involving contracts wherein a right to recover damages for mental sufferings has been recognized, but also all cases relating to tortuous injuries in which recovery is allowed for sufferings of that nature by way of exemplary damages or of damages sometimes said to be in the nature of exemplary damages.

Concerning the rule of damages in tort, it is said in *Coy v. Indianapolis Gas Co.*, 146 Ind. 655: "All damages directly traceable to the wrong done, and arising without an intervening agency, and without fault of the injured person himself, are recoverable." The rule as thus expressed does not require that the particular injurious consequence complained of should be such as might have been reasonably expected to follow from the negligent conduct, or such as could have been contemplated as the probable result, but only that it be the direct and natural effect of the wrongful act or omission.

A person who wrongfully causes fright to a horse being driven lawfully upon a public highway, by producing an extraordinary noise or by exhibiting an unusual object calculated to frighten horses, is liable for damage caused by reason of the horse taking fright; but it has been said the resultant injury must be of such a general character as might have been reasonably foreseen and provided against: See *Billman v. Indianapolis etc. R. R. Co.*, 76 Ind. 166, 174; 40 Am. Rep. 230.

It is well settled that mental suffering may be taken into consideration in estimating damages in cases of physical injury caused by actionable negligence; that recovery may be had for physical and mental sufferings produced by and arising out of such physical injury, and that in such case the jury may consider the bodily pain and suffering and the anxiety and distress caused by the injury as natural and direct results <sup>206</sup> thereof. But it has been often denied that fright, peril, pain of mind, or mental suffering may constitute a distinct and separate ground of recovery or element of damages, though in truth proximately resulting from a wrong.

It has been the general doctrine that mental suffering alone not accompanied by any physical injury, cannot be the foundation for the recovery of damages, except in some instances where they are allowed as a species of punitive damages: See *Canning v. Inhabitants of Williamstown*, 1 Cush. 451; *Salina v.*



Trosper, 27 Kan. 544; Atchison etc. R. R. Co. v. McGinnis, 46 Kan. 109; Morse v. Duncan, 14 Fed. Rep. 396; Wyman v. Leavitt, 71 Me. 227; 36 Am. Rep. 303; Johnson v. Wells, 6 Nev. 224; 3 Am. Rep. 245; Indianapolis etc. R. R. Co. v. Stables, 62 Ill. 313; Terre Haute etc. R. R. Co. v. Bruncker, 128 Ind. 542.

Ewing v. Pittsburgh etc. Ry. Co., 147 Pa. St. 40, 30 Am. St. Rep. 709, was an action by husband and wife for injury to the latter. The wrong, as stated in the complaint, was a collision of cars upon the railway of the defendant, in consequence of which the cars were broken, overturned and thrown from the track, and fell upon a lot of ground and premises of the plaintiffs and against and upon their dwellinghouse and thereby greatly endangered the life of the wife, then in the dwellinghouse, "and subjected her to great fright, alarm, fear and nervous excitement and distress, whereby she then and there became sick and disabled and continued to be sick and disabled from attending to her usual work and duties, and suffered and continues to suffer great mental and physical pain and anguish, and is thereby permanently weakened and disabled." It was held that the wrong complained of was not the proximate cause of the injury stated. It was said to be plain that the only injury proceeded from fright, <sup>207</sup> alarm, fear, and nervous excitement and distress, and the court remarked: "We know of no well-considered case in which it has been held that mere fright, when unaccompanied by some injury to the person, has been held actionable. On the contrary, the authorities, so far as they exist, are the other way."

In Haile v. Texas etc. Ry. Co., 60 Fed. Rep. 557, it was alleged in the plaintiff's petition that the insanity of his ward was caused and brought about by the injuries and sufferings he underwent on account of the accident and hardships complained of. Among the things so complained of was the falling of the train through a bridge, and it was alleged that the shock of the accident was so great as to hurl him from his seat to the floor of the car, where he lay prostrated by the shock. But, as observed by the court, it was not alleged that any bodily injury was sustained by the shock, and there was no claim for damages for any such injury. It was held that the insanity could not be regarded as a proximate effect of the defendant's negligence.

In Purcell v. St. Paul City Ry. Co., 48 Minn. 134, the complaint showed that the defendant's negligence caused to the

plaintiff sudden fright and a reasonable fear of immediate death or great bodily harm, and that the shock thus caused threw her into violent convulsions and caused her a miscarriage and subsequent illness. The court, remarking that it might be conceded that any effect of a wrongful act or neglect on the mind alone will not furnish a ground of action, held that the complaint showed a physical injury, of which the defendant's negligence was the proximate cause.

In *Fitzpatrick v. Great Western etc. Co.*, 12 U. C. Q. B. 645, the complaint showing a negligent collision stated, as the damage suffered by the plaintiff, a passenger, <sup>208</sup> that thereby the plaintiff "was much affrighted, terrified, and alarmed, whereby she became sick, sore, and disordered, and so continued from thence hitherto; during which time she suffered great pain and anguish, insomuch that her life was endangered, and thereby also, by reason of the terror and alarm occasioned to her by the said collision, and of such sickness caused thereby, she had a premature labor, and bore a stillborn child." The complaint was held sufficient on demurrer. The court said: "The only difficulty suggested is the introduction of the statement of alarm and affright, as if preceding and occasioning the sickness and disorder. But, in our opinion, we are not bound to read the declaration in that manner. We may, we think, consider the fright and commencement of the sickness, etc., to be alleged as simultaneous; and if, as we do not doubt, the declaration would be good without stating the affright, but stating only the sickness, etc., as the result of the defendant's negligence, we do not see that the addition of this statement makes it demurrable."

In *Victorian Ry. Commrs. v. Coultas*, L. R. 13 App. C. 222, before the privy council, on appeal from the supreme court of the colony of Victoria, the action was one to recover for injuries sustained by Mary Coultas through the negligence of the appellant and expenses incurred by her husband through her illness. The husband and wife, with a brother of the latter, were driving in a buggy, and had to cross a level crossing on the line of the railway. When they came to the railway the gates were closed, and the gatekeeper opened the one nearest them and went across to the opposite gate, they following him. When they were partly on the farther line of railway a train was seen approaching on it. The gatekeeper directed them to go back, but the husband, who was driving, <sup>209</sup> shouted to the gatekeeper to open the opposite gate, and went on. He got the buggy across the line, so that the train did not touch it.

But as the train approached the wife fainted. The evidence showed that she received a serious nervous shock from the fright, and that illness from which she afterward suffered was the consequence of the fright. It was held on appeal, reversing the judgment below, that the damages recoverable for negligence must be the result of the defendant's act, such a consequence as in the ordinary course of things would flow from the act; and that damages arising from the mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, be considered a consequence which in the ordinary course of things would flow from the negligence of the gatekeeper. It was accordingly held that the damages were too remote.

In the opinion in the last-mentioned case it is observed that the decision of the supreme court of New York in *Vandenburg v. Truax*, 4 Denio, 464, 47 Am. Dec. 268, was a case of palpable injury caused by a boy who was frightened by the defendant's violence, seeking to escape from it.

The decision of the privy council in the *Victorian Ry. Commrs. v. Coultas*, L. R. 13 App. C. 222, has been regarded with disfavor by several eminent textwriters, and there has been great variety and contrariety in the views taken upon the subject by the courts. A forcible criticism upon the case is to be found in 1 *Beven on Negligence*, second edition, page 76. Among the remarks there made, it is said that it is undoubted law that mental pain or anxiety alone, unattended by any injury to the person, cannot sustain an action. It is also said, on page 83: "The chief objection in principle to a recovery for injuries occasioned, without physical impact, seems to be the <sup>210</sup> difficulty of testing the statements of the sufferer alleging them. An allowance of recovery of damages in respect of such nervous injuries affords opportunities for simulation very difficult to be dealt with, and considerations of policy may well disallow any claim in respect of injury purely subjective. When the physical frame is visibly affected, considerations of this kind are no longer paramount. The objection goes rather to the proof of the injuries than to the legal appraisalment of damages in respect of them when proved. A sufficient safeguard in this case against imposition seems to be the bearing steadily in view the elementary rule that before a plaintiff can recover he must show a damage naturally and reasonably arising from the negligent act."

In *Bell v. Great Northern etc. Co.*, L. R. 26 Ir. 428, the



court followed an unreported case in the court of appeal, Ireland, in preference to *Victorian Ry. Commrs. v. Coultas*, L. R. 13 App. C. 222, and it was held, in effect, that if the plaintiff's fright caused through the defendant's negligence as a reasonable and natural consequence thereof, actually occasioned injury to the plaintiff's health as a reasonable and natural consequence of the fright, damages for such injury would not be too remote.

In *Warren v. Boston etc. R. R. Co.*, 163 Mass. 484, the plaintiff, with his wife, was driving in a buggy across railway tracks, when the gates were lowered by the gateman, and the buggy was hit by the train running on one of the tracks, and the plaintiff was thrown out, or he jumped out. The supreme court refused to treat as error an instruction to the effect that if the defendant's train struck the carriage of the plaintiff, and he was thrown out upon the ground, this would be a tortuous act if the result solely of the defendant's negligence; and if this act resulted <sup>211</sup> in damage to the plaintiff, the defendant would be liable; and that in estimating this damage, the jury might take into account the fright and nervous shock.

In *Spade v. Lynn etc. R. R. Co.*, 168 Mass. 285, 60 Am. St. Rep. 393, the supreme court of Massachusetts recently had before it the question, as stated in the opinion of the court, "whether in an action to recover damages for an injury sustained through the negligence of another, there can be a recovery for a bodily injury caused by mere fright and mental disturbance"; and the court expressed satisfaction with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury, and thought it should also be held that there can be no recovery for such physical injuries caused solely by such mental disturbance, where there is no injury to the person from without.

In *Mitchell v. Rochester Ry. Co.*, 4 Misc. (N. Y.) 575, 25 N. Y. Supp. 744, the negligence of the driver of a street railway car caused the plaintiff, through fright and excitement thereby occasioned, to become unconscious, and as a result of the shock she then sustained she suffered a miscarriage and was sick for a long time, the "mental shock" which she then received being, according to the evidence, a sufficient cause for all the "physical ailments" from which she subsequently suffered. It was said: "It is not intended here to impugn the well-settled and wholesome rule that no damages can be recovered

against a negligent person for purely mental suffering, unaccompanied by any physical injury. It is decided simply that where a physical injury is the natural result of the negligence, although it proceeds from a mental shock caused directly by the negligent act, the defendant is liable if the jury might find from the evidence that the <sup>212</sup> shock caused the injury." The case of *Victorian Ry. Commrs. v. Coultas*, L. R. 13 App. C. 222, is criticised as not well reasoned and as not being based upon authority.

In *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, 56 Am. St. Rep. 604, the decision last above mentioned of the supreme court was reversed by the court of appeals, and it was held that not only can no recovery be had for mere fright, but also no recovery can be had for injuries which are the direct consequences of it. It was said: "Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of the fright, or the extent of the damages. . . . Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual and may, therefore, be expected"; and it was held that her damages were too remote. The conclusion was stated that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury.

In the case before us for decision it is alleged, by way of showing damages arising from the wrongful act of causing the horse attached to the buggy in which the appellant was riding to take fright and run away, that the appellant received a severe nervous shock, was greatly frightened, and her life was put in great and imminent peril, danger, jeopardy, and, further, she has suffered great mental pain and anxiety.

It is not shown that any physical ailment or distress <sup>213</sup> followed as a consequence of the shock, which is not described as enduring, if that would make any difference in the case.

We think it cannot properly be said that such injuries are imaginary or conjectural, or that the sufferings described are not real. Nor does it seem to us proper to say that they cannot be regarded as directly and naturally resulting from the act of the defendant as their proximate cause.

But not every injurious effect of wrong can form the basis of damages. Many ill consequences follow from wrongs as proximate effects for which the law cannot afford redress, because of the inadequacy of the methods and means of courts to reach just and adequate results with sufficient certainty.

The evidence of such injuries is so much within the control of the person claiming to be so injured, and there is so little opportunity for subjecting the fact to the tests which may be and are applied in courts of justice for the ascertainment of the truth to the appreciation of the triers, that besides the encouragement that would be given to increase of litigation, there would be much danger of frequent injustice in allowing such claims to be presented for trial. It would seem that such injuries are among those which courts cannot remedy by means of any practicable methods at their command which can be applied generally so as to secure justice to both the plaintiffs and defendants, and so as best to subserve the interests of the community, whose instruments the courts are in the administration of justice. Such claims for redress seem to be outside the wise policy of the law.

If it may be said that the complaint shows the appellant entitled to recover nominal damages, yet this court will not reverse a judgment for the purpose merely of enabling a party to recover such damages.

The judgment is affirmed.

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**NEGLIGENCE—WILLFUL INJURY—WHAT CONSTITUTES.**—To constitute willful injury there must be design, purpose, and intent to do wrong and inflict injury: *Louisville etc. R. R. Co. v. Anchors*, 114 Ala. 492; 62 Am. St. Rep. 116, and note. Gross negligence includes all lesser degrees of negligence, and when plaintiff's petition charges that an act was done through gross negligence, this does not preclude evidence entitling him to recover for a lesser degree: *Hayes v. Gainesville Street Ry. Co.*, 70 Tex. 602; 8 Am. St. Rep. 624.

**DAMAGES FOR MENTAL ANGUISH.**—Damages for mental suffering alone cannot be recovered as a general rule: *Chapman v. Western Union Tel. Co.*, 88 Ga. 763; 30 Am. St. Rep. 183; *Connell v. Western Union Tel. Co.*, 116 Mo. 34; 38 Am. St. Rep. 575; *Ewing v. Pittsburgh etc. Ry. Co.*, 147 Pa. St. 40; 30 Am. St. Rep. 709, and notes thereto. But the cases are in conflict upon this question: *Head v. Georgia Pac. Ry. Co.*, 79 Ga. 358; 11 Am. St. Rep. 434; *Larson v. Chase*, 47 Minn. 307; 28 Am. St. Rep. 370; note to *Western Union Tel. Co. v. Carter*, 34 Am. St. Rep. 831, 832. See *Spade v. Lynn*, etc. R. R. Co., 168 Mass. 285; 60 Am. St. Rep. 393.

**APPEAL—REVERSAL OF JUDGMENT—NOMINAL DAMAGES.**—Judgment for the defendant will not be reversed where the plaintiff would be entitled to no more than nominal damages: *Mecklem v. Blake*, 22 Wis. 495; 99 Am. Dec. 68. The maxim, *De minimis non curat lex*, is properly applied to such a case: *McConihe v. New York etc. R. R. Co.*, 20 N. Y. 495; 75 Am. Dec. 420, and note.



## TAYLOR v. REGER.

[18 INDIANA APPEALS, 466.]

**PROMISSORY NOTE—WHEN A JOINT OBLIGATION.**—A note signed by two or more parties wherein the promising phrase is, "we promise," is prima facie evidence of a joint obligation, and such a note as an exhibit is sufficient to support an allegation of a joint promise.

**PROMISSORY NOTE—CORPORATION—SIGNATURE OF PRESIDENT AND DIRECTORS.**—Where a corporation is bound by the signature of its president as such, the signing of the names of the directors as such binds the directors as individuals, the word "director" being merely descriptio personae.

**ERROR—EVIDENCE NOT OF RECORD.**—Evidence is not of record unless it is filed before being incorporated in the bill of exceptions.

Charles L. Henry, E. B. McMahon, and J. A. Van Osdol, for the appellants.

Francis A. Walker and Frank P. Foster, for the appellee.

**466** WILEY, C. J. Appellee sued the Pendleton Window Glass Company, Charles B. Orvis, Charles H. Roach, and the appellants, upon a promissory note, of which the following is a copy:

"Pendleton, Indiana, August 31, 1888. On or before September, 1891, we promise to pay to the order of Lorenzo D. Reger, the sum of four hundred dollars, with six per cent interest from date, payable annually and with attorney's fees, value received, without any relief from valuation or appraisement laws. [Signed] The **467** Pendleton Glass Company, by B. F. Aiman, president; C. B. Orvis, vice president; Charles H. Roach, secretary; A. B. Taylor, Benj. Rogers, J. R. Boston, directors."

The issues were joined as to all the defendants below, except Orvis, who was not served with process, and did not appear.

Roach, Taylor, Rogers, and Boston demurred separately to the complaint for want of sufficient facts, which demurrers were overruled. Thereupon they filed a joint answer in two paragraphs: 1. General denial; and 2. Setting up affirmative matter, averring that they signed the note sued on as officers of their codefendant, the Pendleton Window Glass Company, and not as individuals, and it was so mutually agreed and understood by and between them and the payee thereof, and that he accepted said note on the faith and credit alone of said company. A demurrer to this paragraph of answer was overruled, and a reply in general denial. The appellants and Roach filed a cross-complaint against appellee and their codefendant,

the glass company, but the record, as it comes to us, does not present any question arising thereunder, and we need not notice it further.

The cause was submitted to the court for trial, and the court, on its own motion, called a jury, and submitted to it, by way of interrogatories, certain questions of fact. Upon the answers to the interrogatories, as returned by the jury, and the evidence heard, the court made a general finding against the appellants and all their codefendants, except Orvis (the glass company suffering a default) and rendered judgment against them for five hundred and seven dollars and fifty cents. Appellants interposed their motion for a new trial, which was overruled, and such ruling is one of the errors assigned in this court; but as the evidence is not in the record, <sup>468</sup> and as the motion for a new trial calls in question the insufficiency of the evidence to support the finding and judgment, and the alleged error of the court in admitting certain evidence over their objections, we cannot consider the motion, and the assignment of error based upon the ruling thereof.

The interrogatories submitted to the jury by the court to aid it in its determination of the facts, and the answers thereto were as follows:

“(1) Did Albert B. Taylor, Benjamin Rogers, and John R. Boston sign the notes in suit as officers of the Pendleton Window Glass Co.? No. (2) In accepting the note in suit for real estate conveyed to the Pendleton Window Glass Co. did plaintiff, Reger, agree to take the note of said corporation, only for said real estate? No. (3) Did Taylor, Rogers, and Boston, defendants herein, sign the note in suit only that said note might be the valid note of the Pendleton Window Glass Company? No. (4) Did the defendants Taylor, Rogers, and Boston sign the note in suit, as individuals, with the Pendleton Window Glass Co.? Yes. (5) Did the plaintiff, Reger, and defendants agree at the time or before the execution of the note that the same should be executed by the defendants and accepted by plaintiff as the note of the Pendleton Glass Company only? No. (6) Was there a mutual mistake in signing and accepting the note in suit, in this: That it was the agreement that Taylor, Rogers, and Boston were to write ‘by’ before their names on said note? No. (7) Was there an agreement between plaintiff, Reger, and defendants Taylor, Rogers, and Boston, that they were not to be individually bound on said note? No.”

Each of these interrogatories was signed by the foreman of the jury.

The only error assigned which presents any question for our consideration, is the overruling of the appellant's <sup>469</sup> separate demurrers to the complaint. It is insisted that the note sued upon, and made a part of the complaint as an exhibit, purports, on its face, to be the note of the Pendleton Window Glass Company, and not the joint note of such company and appellants. They also insist that it is so ambiguous that it would require proof to fix the identity of the parties liable thereon. Counsel say that the general allegation in the complaint that they (meaning all the signers of the note) "by their promissory note . . . . promise to pay," etc., is not sufficient to make the complaint good, as against the appellants, because such general allegation is inconsistent with the note itself. We cannot agree with this insistence. In our judgment there is no ambiguity or inconsistency between the allegations of the complaint and the exhibit; and no proof, other than the note itself, would be necessary to fix the identity of the parties. The note, on its face, does not purport to be the separate promise or obligation of the Pendleton Window Glass Company, but the joint promise or obligation of such company and appellants to pay money. The language of the note is, "we promise to pay," etc. A note signed by two or more persons, wherein the promising phrase is "we promise," is *prima facie* the joint obligation of the makers in their individual capacity: 4 Am. & Eng. Ency. of Law, 2d ed., 110; Barnett v. Juday, 38 Ind. 86; Humphreys v. Guillow, 13 N. H. 385; 38 Am. Rep. 499.

In Pennsylvania it has been held that where a note had been signed by two persons, the presumption is that it was given by them as individuals, and not as partners: Ellinger's Appeal, 114 Pa. St. 505. The case of the Albany Furniture Co. v. Merchants' Nat. Bank, 17 Ind. App. 531, 60 Am. St. Rep. 178, was in all essential features identical to the case at bar. That was an action upon a promissory note, where, in the body of the <sup>470</sup> note, the words, "we promise to pay" were used, and the note was signed as follows: "Albany Furniture Co. Jas. E. Stafford, Pres.; J. Zapf, Mgr." It was held that the complaint stated a good cause of action against Stafford and Zapf.

Robinson, J., in speaking for the court, after reviewing the authorities, said: "Construing the complaint and the exhibit together, we see no ambiguity. It is alleged to be the joint note of the parties signing it, and the exhibit is not inconsistent



with that allegation."

A corporation can only speak or act by and through its officers or agents. In the case at bar, when the corporate name of the Pendleton Window Glass Company had been subscribed to the note in suit, by "B. F. Aiman, President," such signature bound the corporation, and the signing of the names of the appellants, as directors, added no force or effect to it. Under the circumstances, we must regard the word "directors," opposite the names of appellants, as merely descriptio personae: *Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 531; 60 Am. St. Rep. 178; *McClellan v. Robe*, 93 Ind. 298; *Williams v. Second Nat. Bank*, 83 Ind. 237; *Hayes v. Brubaker*, 65 Ind. 27; *Hays v. Crutcher*, 54 Ind. 260; *Casto v. Evinger*, 17 Ind. App. 298.

In *Heffner v. Brownell*, 75 Iowa, 341, where a note read "we promise to pay," etc., and signed "Independent Mfg. Co., B. S. Brownell, Pres.; D. B. Sanford, Secy.," it was held to be the joint note of the corporation and of Brownell and Sanford: See, also, *Mathews v. Dubuque Mattress Co.*, 87 Iowa, 246; *Lee v. Percival*, 85 Iowa, 639; *Brunswick-Balke-Collender Co., v. Boutell*, 45 Minn. 21.

In our judgment the complaint stated a good cause of action, and the court correctly overruled the demurrer <sup>471</sup> of appellants thereto. In addition to holding the complaint good, we have set out in this opinion the interrogatories submitted to the jury, and the answers thereto. These interrogatories went to the vital question raised by appellants in their second paragraph of answer, and the findings therein made were all adverse to their contention. It is evident that the court, in reaching its conclusion, adopted, as its own, the findings of the jury, upon the pivotal questions submitted to them; and from this we are led to the inevitable conclusion that a correct result was reached, and that substantial justice has been done.

We have already remarked that the evidence is not in the record, but it is proper for us to state our reasons for so holding. The record shows that the motion for a new trial was overruled and judgment rendered June 22, 1896, and ninety days given in which to file a bill of exceptions. It is further shown that the bill of exceptions was presented to and signed by the trial judge, August 22, 1896. The clerk certifies that the bill of exceptions and the longhand manuscript of the evidence were filed in his office August 29th, being seven days after the longhand manuscript was incorporated in the bill of

exceptions. It nowhere appearing in the record that the long-hand manuscript of the evidence was filed in the clerk's office, before it was incorporated in the bill of exceptions, it follows that the evidence is not properly in the record: *Kelso v. Kelso*, 16 Ind. App. 615; *Board etc. v. Fertich*, 18 Ind. App. 1; *Baltimore etc. R. R. Co. v. McCartney*, 18 Ind. App. 704; *Yellow Hammer Gas etc. Co. v. Carlin*, 148 Ind. 68.

Further citation of authorities is unnecessary.

Judgment affirmed.

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**NEGOTIABLE INSTRUMENTS—PLEADING.**—A complaint on a note signed "J. E. Stafford, Pres., J. Zapf, Mgr., Albany Furniture Co.," alleging that the note sued on is the joint note of the parties while the note recites that "we promise to pay," states a cause of action against Stafford and Zapf as individuals: *Albany etc. Co. v. Merchants' Nat. Bank*, 17 Ind. App. 531; 60 Am. St. Rep. 178, and note. Compare *Nebraska Nat. Bank v. Ferguson*, 49 Neb. 109; 59 Am. St. Rep. 522.

**CORPORATIONS—LIABILITY UPON BILLS AND NOTES SIGNED BY OFFICERS.**—A note by which "the directors" of a corporation promise to pay a certain sum, and signed by them without official designation, must be regarded as their joint obligation, and not that of the corporation: *McKensy v. Edwards*, 88 Ky. 272; 21 Am. St. Rep. 339, and note. Whether a corporation alone is bound by a writing signed by its officers, or whether the latter incur personal liability, is a question of intention to be determined from what appears on the face of the writing: *Yowell v. Dodd*, 3 Bush, 581; 96 Am. Dec. 256. See *Hall v. Crandall*, 39 Cal. 567; 89 Am. Dec. 64. Persons dealing with a corporation are bound to know whether or not the officer or agent who represents it, and acts in its name, is authorized so to do: *Credit Co. v. Howe Machine Co.*, 54 Conn. 357; 1 Am. St. Rep. 123, and note; *Jemison v. Citizens' Savings Bank*, 122 N. Y. 135; 19 Am. St. Rep. 482.

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## HINESLEY v. SHEETS.

[18 INDIANA APPEALS, 612.]

**SLANDER—WORDS NOT ACTIONABLE PER SE—COLLOQUIUM—INNUENDO.**—The words "I know Sheets took wheat that did not belong to him" are not actionable per se, but are sufficient where there is a colloquium and innuendo averring that appellee was guilty of larceny, and that parties so understood appellant to mean.

**APPELLATE PROCEEDINGS—EVIDENCE NOT OF RECORD.**—The evidence is not of record unless it is filed before being incorporated in the bill of exceptions. The record must show this affirmatively.

J. B. Milner and Bryan & Randolph, for the appellant.

Owen E. Brumbaugh and Joseph Combs, for the appellee.

**612** HENLEY, J. This was an action for slander, brought by appellee against appellant. The complaint was in six paragraphs. There was a trial by jury, and a verdict and judgment in favor of appellee. Appellant's motion for a new trial was overruled. The assignment of error filed in this court questions the ruling of the lower court upon the sufficiency of each paragraph of **613** the complaint and the ruling on the motion for a new trial.

Appellant's counsel direct their argument to the first and third paragraphs of the complaint. These paragraphs are almost identical; they are so nearly alike that if one is good as against a demurrer, they are both good; if one is bad, they are both bad. The material part of the first paragraph of complaint is as follows: "That on or about the fourteenth day of July, 1894, the said defendant, in a certain discourse by him had in the presence and hearing of Charles Gerard and divers other persons, falsely and maliciously spoke and published of and concerning this plaintiff the following false, scandalous, defamatory, and slanderous words and language, that is to say: 'I know that Sheets (meaning plaintiff, who was then a tenant on a farm owned by defendant and had grown a crop of wheat thereon) took wheat that did not belong to him.' 'I know that Sheets (meaning plaintiff) has taken wheat that does not belong to him.' 'I saw the wagon go across the field again, and I know that Sheets (meaning plaintiff, who was then a tenant on defendant's land and had grown a crop of wheat thereon, and was at said time engaged in threshing said wheat) has took wheat that did not belong to him.' Then and there and thereby meaning and charging, and was understood by said Gerard and divers other persons then present to mean and charge that said plaintiff had feloniously stolen, taken, and hauled away of the personal goods and chattels of said defendant one load of wheat, and was guilty of the crime of larceny. Wherefore," etc.

The sufficiency of this complaint must be considered without reference to the evidence adduced upon the trial. We do not believe that the words charged are actionable per se. Appellee might have taken wheat **614** that did not belong to him without committing a crime; he might have taken it with the permission and consent of the owner, and the mere allegation of the words spoken as stated in the complaint without the colloquium and innuendo would be insufficient. In the complaint, however, it is distinctly averred that appellant meant



and charged by the speaking of said words that appellee was guilty of the crime of larceny, and that appellee had feloniously taken, stolen, and carried away the goods and chattels, the property of appellant, and that the persons so hearing the words, understood appellant so to mean. We think each paragraph of complaint in the cause was sufficient. In the case of *Harrison v. Manship*, 120 Ind. 43, relied upon in part by appellant, the words charged were as follows: "That he (meaning plaintiff) took and drove off his ducks and sold them; that he (meaning plaintiff) drove his (meaning defendant's) ducks off and sold them; that he (meaning plaintiff) drove his (meaning defendant's) ducks off and sold them, and if he (meaning plaintiff) was so mean as to drive his (meaning defendant's) ducks off and sell them that he (meaning plaintiff) could have them; that Allen C. Harrison drove his (meaning defendant's) ducks off and sold them; all of which charges were false and slanderous, whereby the plaintiff's character was brought into great and manifest and public scandal and disgrace, and he was damaged," etc. The question in this case, as here, came up on the sufficiency of the complaint, and Coffey, J., delivering the opinion of the court, said: "There is no colloquium or innuendo laid in this complaint. We have simply the words 'he drove off my ducks and sold them,' without any averment as to the circumstances under which the words were spoken, or as to the sense in which they were used, or as to how they were understood. The simple question, <sup>615</sup> therefore, for our determination is, Do the words charged to have been spoken import the commission of a crime? We do not think they do. The verbs used are 'take,' 'drive,' and 'sell,' all of which in their usual sense denote innocent action.

"Had the appellant averred any extrinsic facts tending to show the commission of a crime, and had in any manner, by averment, connected the speaking of the words charged in the complaint with the commission of such crime, no matter how defective such averments, the complaint would have been good after verdict; but here, as we have seen, there is a total absence of any averment that a crime had been committed."

We are of the opinion that the case cited and quoted from does not aid appellant, but is strongly against his contention.

The other alleged errors of the lower court arise out of the overruling of appellant's motion for a new trial, and depend for their solution upon the evidence. It is contended by counsel for appellee, that the evidence is not properly in the rec-

ord. The longhand manuscript of the evidence was filed in the clerk's office upon the same day that the bill of exceptions was approved by the trial judge and filed in the clerk's office. It is nowhere made to affirmatively appear by the record that the longhand transcript of the evidence was filed in the clerk's office prior to its incorporation in the bill of exceptions. It is imperative that the record should so show. It is not enough that the record shows the filing to have been on the same day: *Manley v. Felty*, 146 Ind. 194; *Hamrick v. Loring*, 147 Ind. 229; *Rogers v. Eich*, 146 Ind. 235; *Marvin v. Sager*, 145 Ind. 261; *De Hart v. Board*, 143 Ind. 363; *Burns' Rev. Stats.* 1894, sec. 1476 (*Horner's Rev. Stats.* 1896, sec. 1410).

<sup>616</sup> The above are but few of the large number of recent decisions upon this point of practice.

We find no error in the record for which the judgment should be reversed. Judgment affirmed.

**SLANDER—INNUENDO AND COLLOQUIUM—OFFICES OF—** An innuendo in criminal slander is an explanatory averment of the meaning, which charges no fact and neither adds to, nor qualifies, any previous allegation and does not admit of being sustained by evidence: *Dickson v. State*, 34 Tex. Cr. Rep. 1; 53 Am. St. Rep. 694, and note. The colloquium serves to show that the words were spoken in reference to the matter of the averment: *Van Vechten v. Hopkins*, 5 Johns. 211; 4 Am. Dec. 339. Words not actionable per se cannot be made so by innuendo: *Patterson v. Wilkinson*, 55 Me. 42; 92 Am. Dec. 568. It is the colloquium which must justify the innuendo: *Peterson v. Sentman*, 37 Md. 140; 11 Am. Rep. 534. Lack of space forbids our discussing the many cases in which these rules have been applied: See monographic note to *Van Vechten v. Hopkins*, 4 Am. Dec. 348-354; *Posnett v. Marble*, 62 Vt. 481; 22 Am. St. Rep. 126; *Callahan v. Ingram*, 122 Mo. 355; 43 Am. St. Rep. 583; *Bornman v. Boyer*, 3 Binn. 515; 5 Am. Dec. 380; *Haines v. Campbell*, 74 Md. 158; 28 Am. St. Rep. 240.

**APPELLATE PROCEDURE.**—Unless it affirmatively appears that the longhand manuscript of the evidence was filed with the clerk before it was incorporated in the bill of exceptions, the evidence cannot be considered as of record: *Bedford Belt Ry. Co. v. McDonald*, 17 Ind. App. 492; 60 Am. St. Rep. 172; *Taylor v. Reger*, 18 Ind. App. 466, ante, p. 352.

## DRUDGE v. LEITER.

[18 INDIANA APPEALS, 694.]

**COMPLAINT—ACTION FOR DEBT—SUFFICIENCY.**—An averment of the delivery of a certain amount of wheat of a certain value by plaintiff to defendant is not a sufficient averment to sustain an action for debt.

**WAREHOUSEMAN'S RECEIPT—CONTRACT OF BAILMENT.**—A warehouseman's receipt for a certain amount of wheat

in store, subject to warehouseman's charges, fire at owner's risk, is a contract of bailment.

**ACTION ON IMPLIED CONTRACT—AMOUNT TO BE RECOVERED.**—In an action on an implied contract for wheat sold, plaintiff can recover not the value of the wheat, but the price received.

**BAILEE'S LIABILITY—DESTRUCTION OF PROPERTY.**—When property in the custody of the bailee is destroyed accidentally, without any fault on his part, he is not liable.

**USAGE—CONSTRUCTION OF CONTRACT.**—Warehouseman's receipts for wheat received may be construed by adopting the meaning of the terms as explained by commercial usage.

**WAREHOUSEMAN—OWNERSHIP OF MINGLED GRAIN --TENANTS IN COMMON.**—Where a warehouseman receives grain and mixes it with his grain, or that of others, and is engaged in selling the grain so mixed, the various owners of the grains are tenants in common of the entire quantity of the commingled grain.

**MINGLED GRAIN—OWNERSHIP—CONTINUANCE OF.**—A depositor of grain in a common receptacle until he withdraws or transfers his grain, is a tenant in common, not only while his grain is in the common store, but also as long as any grain is in the common store.

**MINGLED GRAIN—PROPORTIONATE SHARE OF TENANTS IN COMMON.**—The share of each tenant in common of the mingled grain on hand, at any time, will be a proportionate part of the amount on hand in the proportion which his deposit bears to the aggregate of the other deposits.

**WAREHOUSEMAN'S LIABILITY—FIRE—WHEAT SOLD.** While warehouseman would not be liable for wheat destroyed by fire, he would be responsible for wheat sold, and not represented by wheat destroyed. Depositor could recover for the difference between the amount represented by the receipt and his individual share of the destroyed wheat.

W. L. Essick and Conner & Rowley, for the appellant.

G. W. Holman, R. C. Stephenson, M. A. Barker, and J. H. Bibler, for the appellees.

<sup>695</sup> **BLACK, J.** The appellant's complaint against the appellees contained four paragraphs. A demurrer to the first paragraph for want of sufficient facts was sustained.

In the first paragraph it was alleged, that on the thirty-first day of March, 1894, the appellees were partners, doing business under the firm name of Leiter & Petersen, owning and operating the Pottowattomie Flouring Mills at Rochester, Indiana; that on said day the appellant delivered to the appellees, at their said mills, six hundred and ninety-nine and four-sixtieths bushels of wheat, then of the market value of sixty cents per bushel, and of the total value of four hundred and nineteen dollars and forty cents; "and that in this way, and for said wheat, the said <sup>696</sup> defendants became indebted to the plaintiff in said sum, which, though due, remains wholly unpaid; wherefore," etc.



We are informed by counsel for appellant that this paragraph is upon the theory of debt. We are unable to find it sufficient upon any theory. It does not show a breach of any contract, the violation of any duty relating to person or property, the infringement of any right, or any ground upon which the appellant is entitled to relief in law or equity. Admitting as true the averment of facts on which the alleged indebtedness is predicated, such a consequence does not legally follow. Such facts might well exist as stated without any indebtedness: See *Stanton v. Kenrick*, 135 Ind. 382.

Demurrers to the second and third paragraphs of answer to the second and third paragraphs of complaint, and demurrers to the second and third paragraphs of answer to the fourth paragraph of complaint were overruled.

In the second paragraph of complaint it was stated, in substance, that on the thirty-first day of March, 1894, and for a long time before and after that date, the appellees were partners, under the name and style of Leiter & Petersen, owning and operating the Pottowattomie Flouring Mills, at Rochester, and were also at the same time shipping and selling wheat and grain; that on said day the appellant delivered to the appellees at their said mills, six hundred and ninety-nine and four-sixtieths bushels of wheat, which the appellees then and there received; and they issued to the appellant a receipt therefor as follows: "No. 67. Mar. 31, 1894. Received of F. M. Drudge six hundred and ninety-nine 4-60 bushels of wheat in store, subject to our charges. Fire at owner's risk. Leiter & Petersen." It was alleged that afterward, but at what particular date the appellant could not state, the appellees <sup>697</sup> sold said wheat and converted it to their own use, without the knowledge or consent of the appellant, and received therefor the sum of four hundred and forty dollars. It was further stated: "The plaintiff here expressly waives the tort in the sale and conversion aforesaid, and sues in debt for the said four hundred and forty dollars, which he says the defendants justly owe him; and he says the said sum is due, but remains wholly unpaid. Wherefore," etc.

In the third paragraph of complaint, after stating the delivery of the wheat and the issuing of said receipt, the appellant sought to recover upon an alleged contemporaneous oral agreement that he should receive money only for said wheat. A valid agreement to such effect would be, not a contract of bailment, but one of sale: *Lyon v. Lenon*, 106 Ind. 567.

The receipt was so drawn as to constitute a contract of bailment: See *Pribble v. Kent*, 10 Ind. 325; 71 Am. Dec. 327; *Schindler v. Westover*, 99 Ind. 395.

The third paragraph of complaint proceeded upon the false theory that a recovery might be had upon a contemporaneous oral agreement which contradicted the written contract.

The fourth paragraph of complaint was insufficient upon the theory on which it proceeded, which was that of waiving the conversion and seeking a recovery upon an implied contract, the conversion shown being the sale of the wheat by the appellees and the appropriation of the money received for it to their own use. In such case, it is not the value of the converted wheat that may be recovered, but it is the price received for the property; and this was not stated in the fourth paragraph: See 26 Am. & Eng. Ency. of Law, 792 et seq.; 28 Am. & Eng. Ency. of Law, 569 et seq.; *Jones v. Gregg*, 17 Ind. 84, 87.

We need not consider the question as to the action of the court in overruling demurrers to answers, except <sup>698</sup> to inquire whether the second and third paragraphs of answer to the second and third paragraphs of complaint presented sufficient defenses to the second paragraph of the complaint. In both of these paragraphs of answer the appellees admitted the execution to the appellant of the receipt, and alleged that on the 12th of February, 1895, their mill and storehouse, with the contents thereof, was totally destroyed by fire without any fault on their part, and that no demand was made by the appellant. It was also in substance alleged in both paragraphs that at the time of the execution of the receipt, and ever after, until the fire, the appellees had on hand in said mill and storehouse wheat of grade and quality like that stored by the appellant, in sufficient quantity to comply with any demand of the appellant for the return of his said wheat.

The distinctive difference between the paragraphs was, that while it was alleged in the second that on the day of the fire the appellees had on hand wheat in store in said mill and storehouse of like grade and quantity (quality) sufficient to restore to all having wheat stored therein the quantity they each so stored, it was stated in the third paragraph that at the time of the fire the appellees had on hand in the said mill and storehouse wheat of like grade and quality as that stored by the appellant sufficient to fully return to him the amount called for by said storage receipt.

Construing the pleadings according to the effect manifestly

intended and given to them, the question is presented as to whether or not in such a case it is a sufficient defense to the entire cause of action to show that the warehouseman at the time of the destruction of his warehouse, with its contents, by fire, without his fault, had there on hand as much grain as the plaintiff had deposited, and of the same kind and <sup>699</sup> quality; or is it necessary to such full defense to show that he had on hand enough grain to supply to all his depositors the quantity stored by them?

When property in the custody of a bailee is destroyed accidentally, without any fault on his part, he is not liable: *Rice v. Nixon*, 97 Ind. 97; 49 Am. Rep. 430.

By an act of March 25, 1879, Acts 1879 (Spec. Sess.), page 231, sections 8720 et seq., of Burns' Revised Statutes of 1894 (Rev. Stats. 1881, sec. 6541, et seq.), it is provided (section 1) that "every person, firm, company, or corporation, receiving . . . wheat . . . in store, or undertaking to receive or take care of the same, with or without compensation or reward therefor, shall be deemed and held to be a warehouseman." In section 2, provision is made for the giving of a receipt by the warehouseman for the article so received, "which receipt shall be evidence in any action against said warehouseman." By section 7 it is provided, that no warehouseman or other person shall sell or incumber, ship, transfer, or in any manner remove beyond his immediate control any goods, wares, merchandise, produce, commodity, property or chattel for which a receipt or voucher shall have been given, without the written consent of the person holding and producing such receipt. Section 9 provides for the punishment as for a crime of any warehouseman or person who shall willfully, knowingly, and purposely violate any of the provisions of the act, and also provides: "Every person aggrieved by the violation of any of the provisions of this act shall have and maintain an action against the person, company, or corporation violating the same, to recover all damages, immediate, consequent and legal, which he may have sustained by reason of such violation as aforesaid, whether such person may have been convicted criminally or not."

*Miller v. State*, 144 Ind. 401, was a criminal prosecution <sup>700</sup> under sections 7 and 9 of said act of 1879. It was contended on behalf of the defendant that, from the manner in which he did business, of which the prosecuting witness had knowledge, it must have been understood by both that the de-



fendant might mix the wheat of the prosecuting witness with other wheat in the defendants' storehouse, and might sell the mixture in the course of business. Speaking of this claim of counsel, the court said: "Undoubtedly the parties might have agreed that this should be done, but only by the written consent of the holder of the receipt or his surrender of the same. No agreement of that kind is shown, and until he thus abandoned his rights under the statute the holder of the receipt is entitled to claim the wheat for which it calls." It was held that an instruction was correct by which the court, in effect, informed the jury that if the defendant, without the written consent of the holder of the receipt, mixed his wheat with other wheat and sold the same, the defendant was guilty of a violation of the statute. "That," said the court, "is but stating what the statute expressly declares." In that case there was no wheat whatever left in the defendant's warehouse, or elevator, but he had disposed of it all, and thus had embezzled the wheat of the prosecuting witness, "the very evil," the court said, "against which the statute was directed."

In the absence of an agreement to the contrary, the usages of a particular business, it is held, may be presumed to have entered into and formed a part of the contracts and understandings of persons engaged in such business and those who deal with them: *Morningstar v. Cunningham*, 110 Ind. 328; 59 Am. Rep. 211.

Usage in a particular trade or business cannot control an express contract, but it is presumable, when a contract is ambiguous, that it was made with reference <sup>701</sup> to a known usage or ordinary course of a particular business. In such case the known and ordinary course of the particular business may be proved, to raise a presumption that the transaction was in conformity therewith: *Lyon v. Lenon*, 106 Ind. 567.

*Rice v. Nixon*, 97 Ind. 97, 49 Am. Rep. 430, related to the loss by fire of wheat stored. Speaking of the principle applicable where a warehouseman receiving wheat to be stored for the owner commingles it with his own wheat, it was said by the court: "Articles of such a character can be separated by measurement, and no injury result to the owner from the act of the warehouseman in mingling them with like articles of his own." It was also said, that the great weight of authority is, that in such case the contract is one of bailment, and not of sale, the warehouseman and the depositor becoming owners as tenants in common. It is further said, that it cannot be pre-

sumed that warehousemen in receiving grain for storage, or depositors in intrusting it to them for that purpose, intended or expected that each lot, whether of many thousand bushels or of a few hundred, should be placed in separate receptacles; but that the presumption is that the warehouseman and the depositor intended that the grain should be placed in a common receptacle and treated as common property: See, also, *Morningstar v. Cunningham*, 110 Ind. 328; 59 Am. Rep. 211; *Schindler v. Westover*, 99 Ind. 395.

In *Bottenberg v. Nixon*, 97 Ind. 106, it is held, that the warehouseman is bound to keep sufficient grain on hand to meet the demands of depositors, and that if he fails to respond to a demand by delivering wheat in quantity and quality such as that received, he is liable, unless some accident not attributable to his fault or negligence caused the destruction of the grain.

In *Baker v. Born*, 17 Ind. App. 422, it was said to be the law in this state, that where a warehouseman receives <sup>702</sup> grain on deposit for the owner, to be mingled with other grain in a common receptacle, from which sales are made, the warehouseman keeping at all times sufficient grain of like kind and quality for the depositor, and ready to deliver to him upon demand, the contract is one of bailment; and that the duty of the warehouseman is to deliver to the depositor, upon demand and the payment or tender of any agreed storage charges, grain of the same kind and quality as that so received: See, also, *Woodward v. Semans*, 125 Ind. 330; 21 Am. St. Rep. 225.

In *Lyon v. Lenon*, 106 Ind. 567, it is said, that a contract of bailment contemplates the return of the goods bailed, or, growing out of the necessities of commerce, where grain is delivered in store, other grain of like quality and grade may be returned in its stead.

In *Bottenberg v. Nixon*, 97 Ind. 106, the depositor knew of the custom of the warehouseman to deposit the grain received from depositors in a common bin with wheat bought by him, and to sell wheat therefrom, while in *Rice v. Nixon*, 97 Ind. 97, 49 Am. Rep. 430, the depositor had no knowledge of this custom.

Where a receipt is so drawn as to constitute a contract, it may be interpreted and construed in the light of commercial usage: See *Schindler v. Westover*, 99 Ind. 395; *Pribble v. Kent*, 10 Ind. 325; 71 Am. Dec. 327.

Comparing and harmonizing these authorities, it may be concluded that such receipts as that given by the appellees to the

appellant may be construed by adopting the meaning of their own terms as explained by commercial usage, and that when a warehouseman is engaged in the business of receiving grain in store and mingling the grain received from depositors in common receptacles with his own grain, or that received in store from other depositors, and it is a part of his business to sell and ship the grain so stored, the <sup>703</sup> various owners of the grain so stored, including the warehouseman, if any of his own wheat be so mingled, and all the various depositors, are tenants in common of the entire quantity of the commingled grain. Such a depositor who has received such a receipt as that above set out is the owner of an undivided portion of the grain; not only while his own grain is actually present in the common store, but his title as tenant in common would continue, though his identical grain has been sold in the course of trade by the warehouseman, while any grain so deposited by any of the various depositors remains in store, unless the holder of the receipt has received back his wheat or a like quantity of wheat of the same kind and quality, or has otherwise parted with his ownership. If at a given time there be in the common receptacle as much wheat as all such owners have deposited, so that all of them could find there the same quantity of wheat that they deposited, of the same kind and quality, then each would own in said receptacle the quantity deposited by him; but if at any time the whole mass were less than the aggregate deposits, then all the depositors, or tenants in common, would together own all the grain, but each depositor would have an undivided share less than the quantity deposited by him, being such proportion of the grain remaining in store as his deposit would bear to the aggregate of the other deposits.

If at a time when there was not enough grain in the warehouse to satisfy full demands of all depositors, the warehouse and its contents were destroyed by fire without the fault of the warehouseman, while he would not be responsible for such loss, he would be responsible for the conversion of such a quantity of wheat as he had sold which was not represented by wheat so destroyed. This seems to be but simple justice.

<sup>704</sup> If at the time of the fire here in question, there was not in store enough wheat to have satisfied demands under receipts of all depositors, the entire quantity deposited by the appellant was not so destroyed, but only his individual share remaining in the warehouse, which would be less than



the quantity represented by his storage receipts, and the appellees would be bound to reimburse him for their sale and conversion of a quantity sufficient when added to his individual share of the destroyed wheat to equal the quantity represented by the receipt. To such an extent he would be damaged within the meaning of the statute. In this view of the matter, the third paragraph of answer to the second and third paragraphs of complaint was insufficient on demurrer.

The judgment is reversed, and the cause is remanded with instruction to proceed in accordance with this opinion.

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**WAREHOUSEMEN—RECEIPT AS CONTRACT OF BAILMENT.**—The delivery of grain for storage in a warehouse is a bailment under the Minnesota statute, and the title thereto remains in the depositor, who is deemed to be the owner of grain in the warehouse to the amount of his deposit, although the identical grain that he deposited may have been removed, and other grain of like kind and quality substituted in its stead: *Hall v. Pillsbury*, 43 Minn. 33; 19 Am. St. Rep. 209.

**WAREHOUSEMEN—CARE AND DILIGENCE REQUIRED.**—The duty of warehousemen imposes on them the exercise of ordinary care only, or, in other words, the care and diligence which good and capable warehousemen are accustomed to show under similar circumstances: *Lancaster Mills v. Merchant's etc. Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586. A warehouseman's negligence is not established by proof of a fire, and the destruction thereby of goods stored with him: *Railroad v. Kelly*, 91 Tenn. 699; 30 Am. St. Rep. 902.

**COTENANCY IN GRAIN IN WAREHOUSE.**—The holders of receipts for grain of the same kind and quality deposited in a warehouse, are tenants in common of the mass of grain of that kind and quality in the warehouse, the interest of each being limited to the amount called for by his receipt; and where the warehouseman puts his own grain in the warehouse, he becomes a tenant in common with the other depositors, his interest in the mass being limited to the excess above what is necessary to meet his outstanding receipts: *Hall v. Pillsbury*, 43 Minn. 33; 19 Am. St. Rep. 209; see *Nowlen v. Colt*, 6 Hill, 461; 41 Am. Dec. 756. When corn of different owners mingled in a warehouse falls short of the amount put in, and for which warehouse receipts are given, the holders of the receipts must share the loss proportionately: *Dole v. Olmstead*, 41 Ill. 344; 89 Am. Dec. 386, and note.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**IOWA.**

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**O'BRIEN v. STAMBACH.**

[101 IOWA, 40.]

**CREDITORS' BILL—EXECUTION, ISSUE, AND RETURN OF, WHEN NOT NECESSARY.**—In suits to subject lands to the payment of judgments, where it is shown that the judgment debtor is insolvent, the creditor is not compelled to incur the expense and delay incident to the issuing and return of an execution nulla bona as a condition precedent to the right to maintain his suit.

**JUDGMENTS, PAYMENT OF, PRESUMPTION AS TO.**—Judgments are prima facie evidence of indebtedness, and he who claims them to be paid must assume the burden of proof.

**EVIDENCE TAKEN BEFORE A REFEREE, ADMISSIBILITY OF.**—One who acts as referee is competent to testify to testimony of the parties taken before him, whether he was regularly appointed or not, in so far as their testimony consisted of admissions, because such admissions, if otherwise relevant, are admissible whether made under oath or not.

**EVIDENCE.**—One who has taken notes of evidence is competent to testify therefrom, though he retains no recollection of the matter testified to, if he knows that the notes, when taken, were correct.

**JUDGMENTS.—PAYMENTS MADE BEFORE JUDGMENT** was entered are concluded by it, and payments thereon after its entry must be pleaded, if relied upon as a defense to a subsequent action.

**FRAUDULENT TRANSFERS—CREDITORS' BILLS—PROPERTY OF DEBTOR IN ANOTHER STATE.**—Though a judgment debtor has property in another state subject to execution, his creditors are not required to go beyond the state of their residence in search of that property, before they have proceeded in the state of his and their residence to subject to their judgments property transferred in fraud of his creditors.

**CREDITORS' BILLS—FRAUDULENT TRANSFERS—SUBSEQUENT CREDITORS.**—Where a conveyance is set aside as fraudulent at the instance of creditors existing when it was made, subsequent creditors may also share in the fruits of the litigation.

**HUSBAND AND WIFE—FORFEITURE BY HER OF HER RIGHT TO HER PROPERTY.**—If a wife intrusts her husband with moneys without any expectation that they will be returned, or that the property purchased therewith shall be hers, she forfeits her rights thereto as against his creditors, and if he subsequently makes a bill of sale to her of property purchased with her moneys merely for the purpose of shielding her from the assaults of his creditors, it cannot accomplish that purpose.

**CREDITOR'S BILL—PERSONAL PROPERTY.**—While it is not usual to do so, a creditor's bill may be maintained to reach personal property which the judgment debtor has transferred for the purpose of hindering and defrauding creditors.

**APPELLATE PROCEDURE—POINTS NOT RAISED IN THE TRIAL COURT.**—Where an objection of a technical nature is not raised in the trial court, and is not jurisdictional, no attention will be paid to it if made in the appellate court.

T. F. McCue and B. E. Kelly, for the appellants.

Soper, Allen & Morling, for the appellees.

<sup>41</sup> **DEEMER, J.** The property which the creditors seek to subject by this proceeding, consists of a blacksmith and wagon shop, a harness shop and lot, and a <sup>42</sup> dwelling-house and lot; also a certain stock of harness, and the tools and fixtures belonging to the two shops mentioned above. At the time this action was commenced, the blacksmith and wagon shop and lot were in the name of defendant Joseph Stambach, a son of defendant Jacob Stambach, but he afterward conveyed it to his mother, the defendant Agnes Stambach. The title to all the real estate is now in the name of Agnes Stambach. The harness shop and lot were acquired in March, 1893, the wagon and blacksmith shop and lot, in May, 1893, and the dwelling-house and lot, in October, 1893. None of this property was the subject of transfer between husband and wife. It all came from a stranger, and the conveyances were made direct to defendant Agnes Stambach. The creditors claim that Jacob Stambach is the equitable and beneficial owner of all of this real estate and personal property; that it was purchased with his own means, and the title thereto taken in the name of his codefendants, for the purpose of hindering, delaying, and defrauding creditors. This claim is denied by the defendants, and defendant Agnes Stambach specially pleads that the property was all purchased with her separate estate, derived from her friends and from labor performed before her marriage with Jacob. The judgment in favor of O'Brien was against Joseph Stambach, as well as Jacob; and Agnes Stambach asked that her title to the blacksmith and wagon shop property be quieted against the apparent lien of the



O'Brien judgment. Such were, in substance, the issues on which the case was tried.

1. It is now insisted that none of the creditors are entitled to pursue the remedy adopted, for the reason that no executions were issued upon the judgments, and for the further reason that it is not shown that they have no remedy at law. It is true that there is no evidence of the issuance of <sup>43</sup> executions, and consequently, nothing of record to show that all legal remedies were exhausted. But we have frequently held that neither law nor equity requires the doing of entirely useless things, and that in suits to subject lands to the payment of judgments, where it is shown that the judgment debtor is insolvent, the creditor is not compelled to incur the expense and delay incident to the issuance and return of an execution nulla bona as a condition precedent to the right to maintain his suit: *Smalley v. Mass*, 72 Iowa, 171; *Gordon v. Worthley*, 48 Iowa, 429; *Postlewait v. Howes*, 3 Iowa, 383. It may be true that, as to the personal property involved in the suit, the objection is good. But more of this hereafter. It is further argued that there is no evidence that Jacob Stambach was insolvent at the time this suit was commenced. An examination of the record abundantly sustains the appellees' contention that Jacob was insolvent, and has been since the year 1891.

2. Appellants contend that there is no evidence that the appellees' judgments are unpaid. The record recites that, at the beginning of the trial, defendants admitted the regularity of the judgments and the filing of the transcripts as alleged in the petitions. These judgments were prima facie evidence of the existence of indebtedness, and the burden was upon the appellants to plead and prove payment: *Code*, sec. 2718; *Wait on Fraudulent Conveyances*, sec. 74; *Junge v. Bowman*, 72 Iowa, 648. The cases relied upon by appellants are not in point. They relate to actions upon attachment bonds, where it is necessary to state, in order to show a cause of action, that the damages have not been paid.

3. Supplemental proceedings auxiliary to execution were had against defendant, Jacob Stambach, and he and his wife and son were examined before a <sup>44</sup> referee appointed for the purpose. This referee was called as a witness in this case, and was permitted to read from his notes the evidence of the witnesses before him. This evidence was all objected to in the court below, and the objection is renewed in this court. It is said there is no evidence of the referee's appointment, no showing as to who

appointed him, and no evidence that he had authority to administer an oath. It is also argued that the whole of his evidence was incompetent. The first of these objections is without merit, for the reason that the witness was competent to testify as to admissions of the parties before him, although he had no appointment from the court and was not authorized to administer oaths. As a private person he would have the right to testify to admissions of the parties to the suit, which were otherwise relevant, competent, and material. The objection to the competency of the witness is, no doubt, predicated upon the assumption that, as he had no personal recollection of what the parties said before him, he could not give their statements in evidence. He did say that he took down the statements of the witnesses correctly, and that he could tell what they said by referring to his notes, and that he knew the notes taken at the time were correct. We have recently had occasion to consider the question here presented in the case of *State v. Smith*, 99 Iowa, 26, 61 Am. St. Rep. 219, and we there held that such evidence as was given in this case was admissible: See, also, *State v. Brady*, 100 Iowa, 191; 62 Am. St. Rep. 560. Certain of the admissions testified to by this witness will not be considered by this court, for the reason that this particular evidence is incompetent and immaterial. It need not be specifically referred to at this time, for the reason that the point does not properly arise under this division of the opinion.

<sup>45</sup> 4. Appellants insist that the appellees are not entitled to the relief demanded, for the reason that the evidence shows that they, or some of them, have or had security for their claims, and for the further reason that they, or some of them, have realized from this security, and have not given Jacob Stambach credit on their judgments for the amounts so realized. There is no pleading raising the issue sought to be presented in this branch of appellants' argument, and we need not give it any further attention. If the matters referred to arose before the creditors obtained their judgments, then they are concluded by the judgments. If they arose afterward, then defendants must plead them, in order that they may be considered: *Diamond v. Jones*, 76 Iowa, 422. See, also, 5 Ency. of Pl. & Pr. 530, and cases cited. If it be conceded that Jacob Stambach has property in Dakota, as it is claimed, it is not required of the creditors that they go out of the state to enforce their claims before proceeding against some of his fraudulent grantees to subject

real estate situated in this state, and in the county where the judgments were obtained.

5. As to the merits, the defendant Agnes Stambach claims that she had money of her own before she married Jacob; that she loaned this money to her husband from time to time after her marriage; that in the year 1890, the husband conveyed to her certain property, at a time when they were living in Dakota, in satisfaction of her claims; that with the proceeds of this property she purchased the property in question, and that she is the owner thereof. With reference to the blacksmith shop and lots, which, it seems, were deeded to Joseph, her claim is that the deed was made upon condition that he (Joseph) should remain with the family and work for her until he was <sup>46</sup> twenty-one years of age; that afterward Joseph concluded not to carry out the arrangement, and thereupon conveyed the property to this defendant. The plaintiffs deny all these claims, and say that Jacob Stambach is the beneficial owner of all the property, and that title is in the wife for the sole and only purpose of defrauding the creditors of the husband. Much of the evidence taken on these issues was incompetent, and, without stopping to point out, it is sufficient to say that we consider such of it, and only such, as we believe to be competent. It appears that none of the property now in question came by conveyance directly from the husband. The harness shop lot and improvements were contracted for by Jacob Stambach in March, of the year 1893, and the price was secured by a mortgage upon the chattel property brought by defendants from Dakota, and which the defendant Agnes claims to own. The deed to the property was executed in January, 1894, and ran to Agnes Stambach. The purchase of the wagon and blacksmith shop was made in May, 1893, while the case of Fuller & Johnson against Jacob Stambach was pending. The deed was made to Joseph Stambach at the instance of Jacob. The dwelling-house was purchased in the fall of 1893, and the deed was taken in the name of Agnes Stambach. The contract was made by Jacob Stambach, however, and he made the payments for the property. When the family removed from Dakota to Iowa, in the year 1891, Jacob Stambach leased the land which they went into possession of, and he conducted the business relating to it in his own name. He also mortgaged and dealt with the property which was brought from Dakota as if he were the owner thereof, although he claimed that, at all times, he did it at the instance and suggestion of his wife.



<sup>47</sup> It is claimed on behalf of appellants that the judgment creditors are all subsequent ones, and that they cannot complain. The Fuller & Johnson judgment was obtained June 7, 1893, on a debt contracted January 11, 1888; the W. J. O'Brien judgment was rendered January 16, 1894, on a debt contracted May 23, 1893; and the Seiberling judgment was rendered October 5, 1894, on a debt contracted July 23, 1884. It will be observed that two of these claimants were creditors long before the bill of sale from Jacob Stambach to his wife, covering the livestock in Dakota, was executed, and the debt to O'Brien was in existence at the time the dwelling-house property and the wagon and blacksmith shops were purchased. Now, while it may be that O'Brien could not complain of the conveyance of the harness shop, or possibly of the wagon and blacksmith shop, if the suit were brought by him alone, because he is a subsequent creditor, and while, for the same reason, he might not complain of the bill of sale of the livestock, yet the other parties may do so, and it seems to be well settled that, where a conveyance is set aside at the instance of existing creditors, subsequent creditors may also share in the fruits of the litigation: *Wait on Fraudulent Conveyances*, sec. 104, and cases cited. As we have already said, Jacob Stambach treated all the property to which we have referred as his own, he mortgaged and sold it in his own name, with the knowledge of the wife, and without objection on her part, save as any wife might from time to time offer objections to the sale of some favorite animal or some desirable piece of property. The business transactions were all in the name of the husband, except the conveyances of the real estate in question, and the bill of sale made to the wife for the livestock in Dakota. Agnes Stambach admits all this, but she claims she was consulted as to all transactions, <sup>48</sup> and that her husband acted as her agent, generally, after they left Dakota, that since that time he had nothing, and that she has owned all. She further claims that she had one thousand one hundred or one thousand two hundred dollars when she was married, and that she either purchased the personal property which was brought to this state from Dakota, or that she loaned her husband money from time to time during their residence in that state, and that the bill of sale to which we have referred, was made in satisfaction of the amount loaned. She makes the former claims at one time, and the latter at another, but we are not content to accept either claim. Her account as to the amount of money she had when she went to Dakota, as to how

she obtained it, and what she did with it, is unsatisfactory and contradictory. And it appears to us, that while she may have had some money in her own right when she married Jacob, she intrusted him with what she had without expectation that it would be returned, or that the property purchased therewith should be hers. The bill of sale executed in Dakota, was made, as we are constrained to believe, to defraud the husband's creditors. It is shown by the evidence that they had trouble with their creditors at the time they left Dakota, and we have no doubt the bill of sale was made to enable them to get away with the property. It was a cover and a sham, and was not intended by either of the parties to be more than a shield as against the assaults of creditors. If we should hold it to be good as between the parties, and thus give a different effect to what we believe was intended, or if we should hold the bill of sale good as against creditors, yet we do not think that it sufficiently appears that the proceeds of the property covered thereby, was the consideration for the property which is now the subject of controversy. Various loans of money were made from time to time by the <sup>40</sup> husband, and money and property were acquired by him, after he came to Iowa, which went into the property which plaintiffs now seek to subject. Agnes Stambach cannot claim the property by reason of having furnished the consideration therefor, unless she makes it appear that some part, if not the whole of the consideration furnished was her money or property. This she does not do by that quantity of the evidence required.

It is further said in argument that the increase of the stock brought from Dakota belonged to the wife, and that this was a part of the consideration of the property in question. This would be true if it were shown that she owned the property which came from Dakota. But, as we have said, we do not think that she did; and, if the bill of sale was intended to have any effect, it was to defraud creditors. It will be remembered that this bill of sale was made in July, 1890. This action was commenced in October, 1894, so that the statute of limitations has not barred a direct attack upon the conveyance. The question as to the title to the personalty under the bill of sale, in virtue of the statute of limitations applying to it and defeating creditors of their right to attack it, is not in the case.

With reference to the personal property attempted to be reached by this suit, it is enough to say that courts of chancery, before the adoption of the code, recognized such remedies

as were adopted in this case for the purpose of reaching and subjecting that character of property. Such a proceeding was denominated an "equitable levy," and it has a well-defined place in equitable proceedings. Our statute in express terms gives such a remedy: Code, secs. 3150-3152. And while the proceedings are somewhat unusual, yet rarity is not always a test of correctness. We concede that the general practice <sup>50</sup> is to levy on personal property, and determine the ownership by action of replevin; but, under the statute quoted, there is no doubt but that a judgment creditor may proceed to make an equitable levy upon personal property, the title to which is in dispute, and have the court determine whether it shall be subjected to his judgment or not.

It is said, however, that the creditors cannot subject this personal property without first issuing an execution and levying upon the same and having a return of nulla bona. There are numerous authorities which hold to the rule as claimed, but we do not feel called upon to decide the question at this time. This identical point was not presented to the court below, nor is it in terms presented here, and, as it is not jurisdictional, we must decline to consider it. At most, it is a technical objection, and should not be allowed to defeat the suit unless raised at a proper time and presented to the lower court in the regular manner.

6. Appellants seek to apply the maxim, "He who comes into equity must come in with clean hands," to appellee O'Brien. It seems that he took a bill of sale from Jacob Stambach as security for his claim, in which the consideration was recited as seven hundred dollars. This was several times as much as his claim, and it is said it was fraudulent, and that a court of equity will not give ear to his complaint that the other conveyances were fraudulent. That such a transaction is presumptively fraudulent must be conceded, and that Jacob Stambach made it as he did for the purpose of deceiving and defrauding creditors, cannot be doubted; but we do not think it sufficiently appears that O'Brien was so implicated in the fraud as to bar his action to subject the property in question. O'Brien did not know, when he accepted the bill of sale and had it recorded, <sup>51</sup> what the stated consideration was, and while Stambach no doubt had in mind the defeat of creditors, yet he insisted to O'Brien that the instrument was made in good faith, and to secure him for the loan. A careful consideration of the case as it is presented in the abstracts, and in the transcript of the evi-



dence to which we have resorted, leads us to the conclusion that the decree is right, and it is affirmed.

**EVIDENCE—STENOGRAPHIC NOTES.**—An official reporter who has taken stenographic notes of the testimony of a witness given at a former trial may be permitted to testify therefrom what the testimony of the witness was, though he has no recollection upon the subject, and must depend entirely upon his own notes: *State v. Smith*, 99 Iowa, 26; 61 Am. St. Rep. 219, and note.

**CREDITOR'S BILL—NECESSITY OF EXECUTION AND RETURN.**—A creditor's bill cannot be sustained unless it is shown that his remedies at law have been exhausted, or must be unavailing: *Herrlich v. Kaufmann*, 99 Cal. 271; 37 Am. St. Rep. 50, and note. See *Gilbert v. Stockman*, 81 Wis. 602; 29 Am. St. Rep. 922, and note.

**CREDITOR'S BILL TO REACH PERSONAL PROPERTY FRAUDULENTLY TRANSFERRED.**—When a judgment debtor has fraudulently transferred personal property, and the fraudulent transferee has appropriated to his own use, money from the sale of part of such property, the judgment creditor may, after the return of an execution unsatisfied, maintain a creditor's bill in equity, though part of such property is yet in the possession of the fraudulent vendee and might be levied upon: *Pierstoff v. Jorge*s, 86 Wis. 128; 39 Am. St. Rep. 881, and note. For a thorough discussion of creditors' bills, see monographic note to *Massey v. Gorton*, 90 Am. Dec. 288-301.

**FRAUDULENT CONVEYANCES BETWEEN HUSBAND AND WIFE.**—When a wife having money in her own right gives it to her husband for general use, without any agreement or expectation that it is a loan, and without any obligation for its repayment, the transaction cannot generally, in later years, be made the means of protecting the insolvent husband's property against his creditors. In such cases the transaction will generally be deemed to have been made without consideration, and for the purpose of hindering, delaying, or defrauding creditors: *Cass County Bank v. Weber*, 83 Iowa, 63; 32 Am. St. Rep. 288, and note. See *Kanawha Valley Bank v. Atkinson*, 32 W. Va. 203; 25 Am. St. Rep. 806, and note.

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## AYRES, WEATHERWAX & REED COMPANY v. DORSEY PRODUCE COMPANY.

[101 Iowa, 141.]

**ATTACHMENTS—DELIVERY BONDS.**—In an action upon a delivery bond, it is a sufficient defense that at the time of the levy of the attachment the property belonged to a person other than the defendant in the writ.

**BILLS OF LADING.—AN ASSIGNMENT OF a bill of lading,** while goods are in the possession of the carrier, operates to transfer the title thereto.

**BILL OF LADING AS COLLATERAL SECURITY.**—A bank advancing moneys on goods about to be shipped may receive and hold a bill of lading in its name as collateral security for such advances.

**CORPORATIONS—ULTRA VIRES—NATIONAL BANKS.—**  
**If a national bank advances money on goods about to be shipped and receives a bill of lading as collateral security, one who subsequently attaches such goods under a writ against the shipper is not in a position to insist that the act of the bank was ultra vires.**

**SHERIFFS, ATTACHED PROPERTY, NOTICE TO OF CLAIM OF OWNERSHIP OF.**—Under the statutes of Iowa it is not necessary for one who claims to be the owner of attached property to serve a notice of such claim before commencing an action to recover such property, if a delivery bond has already been executed by which the officer levying the writ is amply protected.

Wm. Milchrist, for the appellant.

Lohr, Gardiner & Lohr, and Marsh & Henderson, for the appellees.

<sup>142</sup> LADD, J. In an action brought upon a delivery bond, the defense is sufficient if it be shown that, at the time of the levy of the writ of attachment, the property belonged to some person other than the defendant: Code, sec. 2998. In this case, the answer alleges that the berries released by the execution of the bond were, at the time of the levy, the property of the First National Bank of Geneva, New York, and not of the defendant in the attachment proceedings. The district court so found. The plaintiff insists that the bank did not, and could not, become the owner thereof. The bank took the bill of lading on which the berries were shipped from Geneva to Sioux City, in its own name, as security for the money advanced on the draft drawn upon the purchaser. Its position would not have been different had it taken an assignment of the bill for such purpose. The method is one commonly made use of in commercial transactions, when it is proposed that goods sold shall not be delivered before payment of the purchase price. The bill of lading represents the goods while in the possession of the carrier for transportation, and its assignment operates as a transfer of the title: *Farmers' etc. Nat. Bank v. Logan*, 74 N. Y. 568; *Dows v. National Ex. Bank*, 91 U. S. 618; *Garden Grove* <sup>143</sup> *Bank v. Humeston etc. Ry. Co.*, 67 Iowa, 526. The bank, in this case, received the bill of lading for the very purpose of transferring title and delivering the berries to the purchaser on the payment of the purchase price. It could not so do without first having received the title.

2. The appellant also calls in question the authority of a national bank to take title to any property except in satisfaction of a previous indebtedness. The bank had received the bill of lading and advanced the money before the attachment proceedings were begun. At that time the appellant was a

stranger to the transaction. As such, he cannot complain: 5 Thompson on Corporations, 6030; 2 Morawetz on Private Corporations, 707; National Bank v. Matthews, 98 U. S. 621; Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261; 38 Am. St. Rep. 656. It appearing that appellant is not in a position to insist that the bank was acting ultra vires, we need not consider the provision of the national banking act authorizing the loan of money on personal security.

3. It is contended that notice of ownership, as required by chapter 45, of the acts of the twentieth general assembly, should have been served on the sheriff before this action was begun. The notice there referred to is for the protection of the officer making the levy. It would serve no such purpose where a delivery bond has been executed, and is not required by the statute permitting the release of property thereby.

Affirmed.

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**ATTACHMENT BONDS—ACTIONS UPON.**—The subject of actions for wrongful attachments, the pleadings and evidence therein, and defenses thereto, is considered in the monographic note to Burton v. Knapp, 81 Am. Dec. 467-480. See extended note to Carpenter v. Innes, 25 Am. St. Rep. 256-259.

**BILLS OF LADING—ASSIGNMENT OF—COLLATERAL SECURITY.**—A bill of lading regularly, fairly, and for value indorsed to another, will pass the title in the goods to the indorsee: Note to Union Pac. Ry. Co. v. Johnson, 50 Am. St. Rep. 546. To have such effect the transfer must be made by him to whom the bill is issued, or by his authority: Jasper Trust Co. v. Kansas City etc. R. R. Co., 99 Ala. 416; 42 Am. St. Rep. 75. The transfer of a bill of lading by way of pledge, or as collateral security for a loan, though it may not absolutely defeat the seller's right of stoppage in transitu, prevents him from asserting that right as against a transferee until he has discharged the debt secured by the transfer: Missouri Pac. Ry. Co. v. Heidenheimer, 82 Tex. 195; 27 Am. St. Rep. 861, and note. See, also, Loeb v. Peters, 63 Ala. 243; 35 Am. Rep. 17; Skilling v. Bollman, 73 Mo. 665; 39 Am. Rep. 537; Douglas v. People's Bank, 86 Ky. 176; 9 Am. St. Rep. 276; Monographic note to Chandler v. Sprague, 38 Am. Dec. 419-422.

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## EQUITABLE LIFE ASSURANCE SOCIETY v. GOODE.

[101 IOWA, 160.]

**EXEMPTIONS IN FAVOR OF LAWYER, WHO ENTITLED TO.**—One who has been duly admitted to the practice of the law, and does law business for certain corporations with which he is connected, and draws agreements and other legal papers, is entitled to retain his law library, office furniture, and supplies, though he is engaged in other business, tries no cases, and does not have out a sign, nor otherwise advertise as a lawyer.



**EXEMPTIONS.**—A lawyer may hold his law library and his ordinary office furniture exempt from execution, though he does not habitually earn his living by their use.

**EXEMPTION LAWS ARE TO BE LIBERALLY CONSTRUED** to carry into effect the purposes for which they were enacted, among which is the protection in the hands of any debtor of the means of earning a livelihood.

Bishop & Wilcoxon and L. W. Goode, for the appellant.

Berryhill & Henry, for the appellee.

**160** **ROBINSON, J.** The attached property consists of fifty-six volumes of Iowa Reports, and six other law books, and office furniture, and office supplies. The defendant claims that the property was exempt from seizure to satisfy the claims of the plaintiff, because **161** at the time it was taken he was a resident of this state, the head of a family, and an attorney at law. It seems to be conceded in argument that if the defendant was a lawyer, within the meaning of the exemption law, at the time of the attachment, then the property in question was exempt from attachment; and the question we are required to determine is whether the evidence was sufficient to authorize the finding that the defendant was at that time a lawyer, within the meaning of the statute. It is conceded that he was admitted to practice as an attorney and counselor in the courts of this state in the year 1878. He testified in his own behalf that he resides in Des Moines; that in December, 1892, when he became a party to the lease on which this action was brought, and when the attachment was levied, he was an attorney at law, and in the real estate business, and supported himself by his personal earnings; that from the time of his admission to the bar until 1881 he confined himself exclusively to the practice of the law; and that since that time he has had other business interests which took a great portion of his time. On cross-examination he stated that he does not advertise himself as an attorney at law, and did not do so publicly during the term of his lease; that he had not tried any cases in court during the term of the lease; that he did not have any sign about the building, excepting his law books, to indicate that he was making his living by practicing as an attorney; that he drew many agreements and other legal papers; that all the legal business of the corporations with which he was connected was referred to him, and that he was their counselor and attended to their miscellaneous law business outside of the courts; that he used his legal knowledge in his own business, and in the business and interests of the corporations

in which he was interested; and that it was common for parties to have him draw papers for <sup>162</sup> them. This is all the evidence there was which tended to show that defendant was a lawyer. To show that he was not a lawyer at the time in question, an attorney who had practiced his profession in Des Moines for thirty years, testified that since January, 1892, he had not known the defendant as a practicing lawyer; that he did not know of his having engaged in the practice of law in the courts since that time, but did not know what he did in his office; that he had understood that his business was largely, if not exclusively, real estate. The lease in question was entered into with the defendant and two others, and provided that the leased premises should be used "as a real estate office, and for no other purpose."

Section 3072 of the code, permits a debtor who is a resident of this state, and the head of a family, to hold exempt from execution, certain personal property, and in addition "the proper tools, instruments, or books of a debtor, if a farmer, mechanic, surveyor, clergyman, lawyer, physician, teacher, or professor." The corresponding provision in the code of 1851, was contained in section 1898, and read as follows: "The proper tools, instruments, or books of any farmer, mechanic, surveyor, physician, teacher, or professor." That provision was considered in *Perkins v. Wisner*, 9 Iowa, 320, and held not to require a mechanic, habitually, to earn his living by the use of his tools, in order to hold them as exempt. The provision, as it now exists, applies to lawyers; and, following the rule of the case cited, it must be held that a lawyer may hold his law library exempt from execution, even though he do not habitually earn his living by its use; and that is true of his ordinary office furniture: *Abraham v. Davenport*, 73 Iowa, 111; 5 Am. St. Rep. 665. Section 3072 of the code, also provides that there shall be exempt "the horse, or team, consisting of not more than two horses, . . . and the wagon or other <sup>163</sup> vehicle, with the proper harness or tackle, by the use of which the debtor, if a . . . teamster or other laborer, habitually earns his living." It was held in *Consolidated Tank-Line Co. v. Hunt*, 83 Iowa, 6, 32 Am. St. Rep. 285, that a person might hold as exempt, under that section, a team, harness, and wagon, which were necessary for use in an occupation which supplied his living, even though the living was not wholly earned by the use of the team, and though the team was driven the larger part of the time by the son of the debtor. Exemption laws are to be liberally con-

strued to carry into effect the purposes for which they were enacted, and among those is the protection in the hands of the debtor of the means for earning a livelihood. The undisputed evidence is that the defendant was occupied at least one-fourth of his time in doing the proper work of a lawyer, and that what he thus did contributed to his support. We have seen that it was not necessary for him to earn his living by the services he performed as a lawyer, to hold the property in question as exempt. Nor was it necessary for him to advertise as a lawyer, nor to appear in any court. A large share of the business of a lawyer is done in his office, and many able and successful lawyers who devote their entire time to the practice of the law, are rarely, if ever, seen in a courtroom, engaged in the trial of a contested case. The only conclusion which can properly be drawn from the evidence is that the defendant was a lawyer, within the meaning of the statute, when the lease in question was made and while it was in force, and that the property in controversy is exempt from attachment and execution. It is proper to say, in this connection, that no claim is made that the defendant holds as exempt, property which a lawyer may not hold. Whether a debtor who, at the same time pursues to some extent, different vocations, as, for example, those of a farmer, mechanic, and lawyer, may hold as exempt <sup>164</sup> the tools, instruments, and books proper for each, is a question not involved in the case, and not decided. For the reason that the evidence does not support the judgment of the district court, it is reversed.

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**EXECUTION—EXEMPTION STATUTES—CONSTRUCTION OF.**—Exemption laws must be liberally construed in favor of the debtor: *Pickrell v. Jerauld*, 1 Ind. App. 10; 50 Am. St. Rep. 192, and note; *Morgan v. Rountree*, 88 Iowa, 249; 45 Am. St. Rep. 234; *Ferguson v. Speith*, 13 Mont. 487; 40 Am. St. Rep. 459, and note. A lawyer's library has been pronounced not to be "a tool of his trade": Monographic note to *Kilburn v. Demming*, 21 Am. Dec. 553. But under the Iowa code ordinary office furniture of a lawyer is exempt from execution as his proper tools and instruments: *Abraham v. Davenport*, 73 Iowa, 111; 5 Am. St. Rep. 665. See extended note to *Baker v. Willis*, 25 Am. Rep. 64. One cannot by multiplying his employments, claim cumulatively several exemptions given by statute to the different employments. The exemption is held to refer to that occupation which engrosses the most of his time and attention: Monographic note to *Kilburn v. Demming*, 21 Am. Dec. 548.



## BRUNDAGE v. CHENEWORTH.

[101 IOWA, 256.]

**APPELLATE PROCEDURE—APPEAL, SERVICE OF NOTICE UPON AN ADMINISTRATOR, WHEN NOT NECESSARY.** It is not necessary to serve a notice of appeal upon the administrator of a deceased defendant, if the rights of the parties may be determined without affecting his interests as administrator. Hence, if a judgment appealed from affects real property, and a notice of appeal is served upon all the heirs at law of the deceased defendant, the court may proceed with the appeal, though his administrator was not served.

**PRACTICE.**—It is error to strike out an amendment to a creditor's bill alleging an agreement between the judgment debtor and his grantee that the latter is to hold the property conveyed to him in trust for the former.

**A CREDITORS' BILL ALLEGING** that the judgment debtor conveyed all the property therein described to his wife, to be held in trust for himself, is sufficient. Under such circumstances, he would remain the real owner, and his creditors, whether existing or subsequent, would be entitled to have the conveyance set aside and the lands subjected to their claims.

**A CONVEYANCE WHICH IS MERELY VOLUNTARY,** and which is free from fraudulent intent on the part of the grantor, may not be attacked by a subsequent creditor.

**FRAUDULENT TRANSFER, SUBSEQUENT CREDITORS, WHEN MAY NOT IMPEACH.**—A conveyance actually and intentionally fraudulent as to existing creditors cannot, as a general rule, be impeached by subsequent creditors.

**FRAUDULENT TRANSFERS—SUBSEQUENT CREDITORS, WHEN MAY IMPEACH.**—If a conveyance is actually fraudulent as to existing creditors, and merely colorable, and the property is held in secret trust for the grantor, who is permitted to use it as his own, it will be set aside at the instance of subsequent creditors. They may also successfully attack a conveyance made with intent to become indebted, or with an express purpose to defraud those who may thereafter become the grantor's creditors.

**CREDITOR'S BILLS—STATUTE OF LIMITATIONS.**—Technically speaking, a cause of action does not accrue in favor of one who files a creditors' bill until the recovery of a judgment, and the statute of limitations does not, therefore, commence to run until that time.

**LACHES.**—**A CREDITORS' BILL CANNOT BE REGARDED AS BARRED BY LACHES** where it does not appear how long the plaintiff's debt had existed before the recovery of judgment thereon, if the bill was filed within a few days after the entry of the judgment.

Creditors' suit to set aside conveyances alleged to be fraudulent, and to subject real property to the payment of the plaintiff's judgment. This judgment was entered in 1894, against Solomon Percy. The bill averred that the judgment debtor was insolvent in 1878, and ever thereafter, and that in the year named he conveyed real property to his wife with intent to hinder, delay, and defraud his creditors; that she afterward

died, and the husband thereafter conveyed to the defendant, Lionel Percey, the undivided one-third of the same property, also for the purpose of hindering, delaying, and defrauding the grantor's creditors. The defendants demurred to the bill, and their demurrer was sustained. The complainant then amended his bill, but the amendment was stricken out as being cumulative merely. Judgment for the defendants. Plaintiff appealed.

Hartley & Irwin, for the appellant.

Palmer & Van Dyke, for the appellees.

**258** KINNE, C. J. 1. Appellees insist that this appeal must be dismissed because no service of notice of appeal has been made upon the administratrix of Solomon Percey, nor upon the minor, Lionel Percey. It appears from the record that Solomon Percey had died, prior to September 13, 1894, and that on said date Cheneworth, his administrator, was substituted as a defendant. The notice of appeal was served October 7, 1895. In the abstract it is alleged to have been served upon the defendants, and upon the clerk, as by statute provided. In the additional abstract of appellees the notice is set out, from which it does not appear that any notice of appeal was served upon Cheneworth, as administrator or otherwise, either personally or upon his attorneys; nor does it appear therein that a notice of appeal was served upon Cheneworth as guardian *ad litem* for Lionel Percey, who is shown to have been a minor, and Cheneworth is shown to have been his guardian. There is nothing in the record indicating the age of said minor, but the allegation is made in the abstract of appellees that he was duly served with a notice of appeal. If the minor was over fourteen years of age, service on him would be sufficient: Code, sec. 2614. As the abstract avers legal service on all of the defendants, and as the minor is named as a **259** defendant in the notice set out in the additional abstract, and as it is therein said that the notice of appeal was duly served, we think we should hold that proper service is shown to have been made in order to give this court jurisdiction as to said minor and his guardian. As we have indicated, the abstract alleges in a general way that the appeal was perfected by serving upon the defendants and the clerk a notice of appeal as by statute provided. This would, in the absence of anything from appellee, be a sufficient averment of service to give this court jurisdiction. The appellees, while not in express terms denying the correctness of the averment,

filed an additional abstract "for amendment to abstract of record," and set out the notice which they claim was in fact served. The name of the administrator, Cheneworth, does not appear therein, and we think it must be held that there is nothing to show service upon him. It appears that Cheneworth, by agreement of parties, as guardian and as administrator, was authorized to lease the land upon terms agreed upon, and to produce the proceeds arising therefrom in court. He was also authorized to pay taxes. Was his interest as administrator such as to require him to be made a party to this appeal? The heirs of Solomon Percey are properly served with notice of an appeal. Under our statute and decisions, the administrator may not take possession of the real estate left by the decedent, except when there is no heir or devisee present and competent to take possession, in which case he may take possession, and receive the rents and profits, and do all other acts which may be for the benefit of those entitled to the benefit of the estate: Code, sec. 2402. It does not appear from this record whether such heirs were present or competent to take possession of the real estate. Unless it be necessary to sell the <sup>260</sup> real estate to pay debts of deceased, the administrator is not interested in it, as it descends to the heirs at law: *Gray v. Myers*, 45 Iowa, 158. If the rights of the parties to this appeal may be determined without affecting the interests of Cheneworth as administrator, then it was not necessary to serve him with notice of appeal: *Payne v. Raubinek*, 82 Iowa, 587. The failure of a plaintiff appellant to serve notice of appeal upon all of the defendants is not jurisdictional if this court can determine and dispose of the questions presented in the absence of such party, and without detriment to his interests. As, for aught that appears, the administrator has no such interest as can be adversely affected by any action of this court, he is not a necessary party to this appeal.

2. It is said that the court erred in striking from the files the amendment to the petition. The amendment charged that the conveyance from Solomon Percey to his wife was made upon the express agreement that the grantor was to be, and remain, the actual owner of the entire beneficial interest in the real estate so conveyed, and that his wife was to hold the property in trust for him. If it should be conceded that this was but a repetition of the allegations of the original petition, or that such allegations were merely cumulative, still the same cannot be said as to the allegations of said amendment in so far



as it relates to the title of Lionel Percey. The original petition contained no averments to the effect that said Lionel was to hold the title of the land conveyed to him in trust for his father. The amendment did contain such averments, and hence, so far at least, the amendment was not open to the objection made in the motion to strike, that it was cumulative. The facts pleaded as to the holding of the land by the wife, and by Lionel, in <sup>261</sup> trust for the grantor, in connection with the other facts stated, constituted, as we shall hereafter see, a good cause of action, and the motion should have been overruled.

3. The original petition was demurred to, on the general equitable ground, that the facts stated did not entitle the plaintiff to the relief demanded. The demurrer was sustained, and error is assigned upon said ruling. The petition did set forth a good cause of action as to the land, the title of which was in the wife. If she held it in trust for the husband, the grantor, as was alleged, and he remained the real owner, then his creditors, whether existing or subsequent, were entitled to have said conveyance set aside, and to have the land subjected to the payment of their claims. We think the demurrer should have been overruled.

4. Counsel for the appellant insists that, when a conveyance is made with a specific fraudulent intent as to existing creditors, it may, for that reason alone, be set aside by a subsequent creditor. Therefore, it is said that the demurrer was improperly sustained. This contention requires us to consider the holdings of this court touching that question. It is said that there is an apparent, if not real, conflict in the decisions of this court as to the right of a subsequent creditor to set aside a prior fraudulent conveyance. Some of the members of the court, as now constituted, are of the opinion that when the facts involved in the cases are carefully considered, there is no real conflict in the cases. Others of us think that while it is possible to reconcile some of the cases of apparent conflict, it is not possible to thus satisfactorily reconcile all of the decisions of the court upon this question. As touching this matter, see dissenting opinion of Beck, J., in *Bonnell v. Allerton*, 51 Iowa, 176. Be this as it may, it is evident <sup>262</sup> that the rules of law heretofore laid down in the decisions of this court, touching this question, are not entirely free from doubt. We may, therefore, briefly consider the cases, and announce such rules as we think should control in such cases.

In *Harrison v. Kramer*, 3 Iowa, 557, it does not appear

whether the claim upon which the creditors' judgment was based, arose prior to the making of the fraudulent conveyance. It cannot, therefore, be said that he was not an existing creditor. The following language is used in the opinion: "If there is any design of fraud or collusion, or intent to deceive third persons, in such conveyances, although the party be not indebted, the conveyance will be held utterly void as to subsequent as well as present creditors, for it is not bona fide." In *Hook v. Mowre*, 17 Iowa, 195, this question was involved, but not decided. The court, however, after an elaborate discussion of the question and the citation of many authorities, seemed to favor the rule that a conveyance in fact fraudulent as to existing creditors, might for that reason alone be set aside as to subsequent creditors. In the case of *Gardner v. Baker*, 25 Iowa, 348, it is said that the plaintiff is not to be treated as a subsequent creditor, and what is there said as to his right to attack the conveyance, even if he was a subsequent creditor, is based upon the thought that the facts show that the legal title had passed to the wife, who held it in trust for her husband. In *Corder v. Williams*, 40 Iowa, 582, the cause of action arose before the making of the conveyance, and the land was conveyed to avoid any judgment which might thereafter be rendered upon said cause of action. It was not a case of a subsequent creditor. In *Romans v. Maddux*, 77 Iowa, 203, the court held that the conveyance could be attacked by subsequent creditors, it not having been made in good faith. Evidently, the language found in the opinion <sup>263</sup> was used with reference to the particular facts of the case. It appeared that the grantor, after the conveyance, treated the land as his own, and that he remained, in fact, the real owner. *Carbiener v. Montgomery*, 97 Iowa, 659, was a case where the cause of action arose before the making of the conveyance. It was held that the facts showed that the conveyance was made with the intent of defrauding the plaintiff therein; hence it was immaterial as to whether the plaintiff was an existing or a subsequent creditor. It is held in *Whitescarver v. Bonney*, 9 Iowa, 480, and in *Fifield v. Gaston*, 12 Iowa, 218, that a subsequent creditor may not attack a prior conveyance which was fraudulent only as to existing creditors. In *Fifield's* case the cause of action arose before the conveyance was made, and hence the question we have in the case at bar was not involved in that case. In *Lyman v. Cessford*, 15 Iowa, 231, the debt was contracted after the conveyance had been made. It was held that a voluntary con-

veyance as to existing creditors would be set aside at the instance of subsequent creditors, if it was made with a fraudulent view to future indebtedness. In *Rollins v. Shaver etc. Carriage Co.*, 80 Iowa, 380, 20 Am. St. Rep. 427, it was held that subsequent creditors cannot complain of a conveyance fraudulent in fact as to prior creditors.

We think the correct rule is: 1. A conveyance which is merely voluntary, and when the grantor had no fraudulent view or intent, cannot be impeached by a subsequent creditor; 2. A conveyance actually and intentionally fraudulent as to existing creditors, as a general rule, cannot be impeached by subsequent creditors; 3. If a conveyance is actually fraudulent as to existing creditors, and merely colorable, and the property is held in secret trust for the grantor, who is permitted to use it as his own, it will be set aside at the instance of <sup>264</sup> subsequent creditors. The second rule above laid down is subject to some exceptions, among which may be mentioned cases in which the conveyance is made by the grantor with the express intent and view of defrauding those who may thereafter become his creditors; cases wherein the grantor makes the conveyance with the express intent of becoming thereafter indebted; cases of voluntary conveyances, when the grantor pays existing creditors by contracting other indebtedness in a like amount, and wherein the subsequent creditors are subrogated to the rights of the creditor whose debts their means have been used to pay; cases in which one makes a conveyance to avoid the risks, or losses, likely to result from new business ventures, or speculations. The following authorities will be found to support the above rules and exceptions: Wait on Fraudulent Conveyances, secs. 96, 97, 98, 100; Bump on Fraudulent Conveyances, 4th ed., secs. 290, 293, 296, 300; 2 Pomeroy's Equity Jurisprudence, secs. 971-973; 1 Am. Lead. Cas., 5th ed., 42, notes. We have not overlooked the fact that there are respectable authorities holding that a conveyance actually fraudulent as to the existing creditors may for that reason alone be avoided by subsequent creditors. We are not, however, prepared to assent to the correctness of such a doctrine. Under our holding, the petition stated a good cause of action under the third rule above stated, and hence the demurrer was improperly sustained.

5. It is claimed that the petition shows upon its face that the plaintiff's cause of action is barred. The conveyance of Solomon Percey to his wife was made in 1878. The plaintiff received his judgment in 1894. The conveyance to Lionel Per-



cey was made in October, 1883, and as it is alleged it was placed upon record, and no date given, we may presume that it was recorded soon after the execution. <sup>265</sup> There is nothing in the petition showing when the deed to the wife was filed for record, nor is there anything to show when the plaintiff obtained actual knowledge of the execution of these deeds. For aught that appears, the fraud in the conveyance of the property may have been known to the plaintiff for ten years before he took any steps to recover his judgment. Technically speaking, his cause of action did not accrue until the recovery of his judgment, in 1894, at which time the statute would begin to run. As this suit was commenced a few days after the judgment was recovered, the action was not barred. Nor do we think it can be said that the case comes within the rule stated in *Mickel v. Walraven*, 92 Iowa, 423, and other like cases, because it does not appear how long the plaintiff's debt had been in existence prior to the time it was reduced to judgment. It is not therefore a case where we can say that the plaintiff has been guilty of such laches as should prevent a court of equity from affording him relief.

For the reasons above given, the judgment of the district court must be reversed.

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**APPELLATE PROCEDURE—FAILURE TO SERVE NOTICE.**—An appeal will not be dismissed because the statement on a motion for a new trial was not served on certain parties to the action not interested in the appeal: *Dore v. Dougherty*, 72 Cal. 232; 1 Am. St. Rep. 48. The failure to serve a notice of appeal on one of the parties is not jurisdictional to the extent of depriving the court of the power to consider and determine such questions in the case as may be decided without affecting his rights: *Soukup v. Union Ins. Co.*, 84 Iowa, 448; 35 Am. St. Rep. 317.

**FRAUDULENT CONVEYANCES—VOLUNTARY TRANSFERS—ATTACK BY SUBSEQUENT CREDITORS.**—A voluntary conveyance is not fraudulent or void as against subsequent creditors, though the grantor was indebted at the time it was executed. To make it fraudulent, proof of actual or intentional fraud is required: *Rudy v. Austin*, 56 Ark. 73; 35 Am. St. Rep. 85, and note. A voluntary conveyance, made with intent to hinder, delay, and defraud creditors, is void as against subsequent as well as prior creditors, though the grantee did not know of nor participate in the fraudulent intent of the grantor: *Gilliland v. Jones*, 144 Ind. 662; 55 Am. St. Rep. 210, and note.

**CREDITOR'S BILL—STATUTE OF LIMITATIONS—WHEN BEGINS TO RUN AGAINST.**—A judgment creditor's cause of action to set aside a transfer as fraudulent as against him, does not accrue until he has recovered judgment, and execution has issued thereon and been returned unsatisfied. Therefore, until such judgment and return, the statute of limitations applicable to his action does not begin to run: *Weaver v. Haviland*, 142 N. Y. 534; 40 Am. St. Rep. 631, and note; *Brown v. Campbell*, 100 Cal. 635; 38 Am. St. Rep. 314.

## WALLACE v. PIERCE-WALLACE PUBLISHING COMPANY.

[101 IOWA, 313.]

**CORPORATIONS, DISSOLUTION OF, JURISDICTION OF EQUITY TO ENFORCE.**—Courts of equity do not possess jurisdiction over corporate bodies to such an extent as to justify them in dissolving corporations, or in winding up their affairs and sequestrating their property.

**CORPORATIONS, RECEIVERS, APPOINTMENT OF.**—A receiver of a corporation may be appointed at the instance of one who brings himself within the provisions of section 2903 of the Civil Code of Iowa, declaring that a receiver may be appointed on the petition of either party to a civil action or proceeding, who shows he has a probable right to, or an interest in, any property which is the subject of the controversy, and that such property or its rents or profits are in danger of being lost or fatally injured or impaired, if the court is satisfied that the interest of one or both parties will be thereby promoted, and the substantial rights of neither unduly infringed.

**A RECEIVER OF A CORPORATION WILL NOT BE APPOINTED** on the ground that it has but two stockholders owning an equal number of shares of stock, and owns stock in another corporation, respecting the management of which there is such disagreement between the stockholders in the first-named corporation that they cannot agree in any measures for the voting of such stock, or for the management of the second corporation, nor will a receiver be appointed of such stock alone.

**A RECEIVER WILL NOT BE APPOINTED** of a corporation on account of disputes among its stockholders or the members of its board of directors or governing body, where the disagreement between its officers is not such as to render it impossible to carry on the business for which it was organized.

**CORPORATIONS, RECEIVERS.**—A STOCKHOLDER WHO IS A CREDITOR OF A CORPORATION has no right, on that ground, to have a receiver appointed where it is solvent and able to meet its obligations.

**CORPORATIONS.**—WHEN A COURT APPOINTS A RECEIVER OF A CORPORATION ON ACCOUNT OF DISSENSIONS in the governing body it will interfere for a limited time only, and to as small an extent as possible.

Guernsey & Bailey, for the appellants.

Dudley & Coffin, and Bishop, Bowen & Fleming, for the appellees.

**320 DEEMER, J.** The Pierce-Wallace Publishing Company is a corporation organized under the laws of this state, having its principal place of business in the city of Des Moines. The stock is owned in equal shares by plaintiff and the defendant J. M. Pierce, and these parties are the sole directors and officers of the corporation; Pierce being the president and business manager, and Wallace the secretary and treasurer and **321** editor. This corporation owns one hundred and eighteen

shares of the capital stock of another corporation known as the Homestead Company, and also owns and conducts two newspapers—one known as the “Wisconsin Farmer,” conducted and carried on at Madison, Wisconsin, and another known as the “Live Stock Indicator,” published at Kansas City, in the state of Missouri. The one hundred and eighteen shares of stock owned by the Pierce-Wallace company in the Homestead Company, is a majority of the stock in the latter company. The other stock is owned by S. F. Stewart, Frank Dunning, A. G. Lucas, and Pierce and Wallace, in their individual capacity. In his original petition the appellee asked for a dissolution of the corporation and a distribution of its assets, but this he afterward amended by striking out the prayer for dissolution, and the relief asked when the case was tried was the appointment of a receiver, and such equitable relief as the facts would warrant. His claim in this court is (using the language of his counsel): “1. That Pierce and Wallace were the sole and equal owners of the stock in the Pierce-Wallace Publishing Company; 2. That between these two men differences of a personal nature had arisen, and from an accumulation of causes had become so intensified that nothing in the way of conference or communication between them was possible; 3. That in consequence, no meeting of the board of directors or stockholders could be had, and no authoritative direction could be given in the affairs of the corporation; 4. That Pierce had taken possession of, and assumed control over, the affairs and property of the corporation, and by one means and another, was excluding Wallace therefrom; 5. That in many respects, the management by Pierce was not only contrary to the views of Wallace, but, having taken sole possession, <sup>322</sup> and maintaining it by such means as might be required, he was manipulating matters in his own interest, and utterly disregarding the rights and wishes of Wallace.” And he contends that the order appointing the receiver, should be sustained.

We are at a loss to know whether or not appellee is asking for the dissolution of the Pierce-Wallace corporation. He struck out this part of the prayer from his original petition, and does not expressly insist upon this relief, although his contention seems to be that at the final hearing he should have such a decree as would practically amount to a dissolution of the corporation. It may be that the reason why he does not ask that the corporation be dissolved is to be found in the fact that his counsel are of the opinion that such relief cannot be had under the



facts as they are disclosed by this record. But, whether this be the fact or not, it is certainly true that, in the absence of express statutory authority, jurisdiction of courts of equity does not exist over corporate bodies to such an extent as to justify them in dissolving corporations, or of winding up their affairs and sequestering their property. This seems to be so well settled that there is scarcely a dissenting voice in authority: See High on Receivers, 3d ed., secs. 288, 289; Beach on Receivers, sec. 403; 20 Am. & Eng. Ency. of Law, 57; Morawetz on Private Corporations, secs. 282, 283; French v. Gifford, 30 Iowa, 153; Thompson on Corporations, secs. 4538, 4539, 6703. Our statutes do not, in terms, authorize the appointment of a receiver for the purpose of winding up a going corporation. The only provision we have is general in character, and does not relate to any specific class of cases. It is as follows: "On the petition of either party to a civil action or proceeding, wherein he shows he has a probable right to, or interest in, any property which is the subject of the controversy, and that such property or its <sup>323</sup> rents or profits are in danger of being lost or materially injured or impaired, . . . the court, . . . if satisfied that the interests of one or both parties will be thereby promoted, and the substantial rights of neither unduly infringed, may appoint a receiver to take charge of and control such property under its direction during the pendency of the action, and may order and coerce the delivery of it to him": Code, sec. 2903. We have heretofore held that this section does not authorize the dissolution of the corporation by a court of equity, nor the placing of its property in the hands of a receiver which practically accomplishes the same purpose: French v. Gifford, 30 Iowa, 153. We have also held, however, that one who brings himself within the provisions of section 2903, may have a receiver appointed as well of the effects of a corporation as of an individual or copartnership: Dickerson v. Cass County Bank, 95 Iowa, 392. And we also said in French v. Gifford, 30 Iowa, 153, that there are cases in which a receiver will be appointed for the property of a corporation, as, for instance, where the officers have been guilty of a misappropriation of the funds or a breach of trust in the discharge of official duties.

Turning now to the record, to discover the facts upon which appellee relies for the appointment of a receiver, we find that his complaints are: 1. That Pierce had arrogated to himself the active management of the corporation, and excluded appellee therefrom, and withheld and refused to give appellee any satis-

factory information as to the condition of the business, and had deprived him of the funds of the corporation, and of the management of its financial affairs, as treasurer of that concern; 2. That irreconcilable differences exist between appellee and Pierce, which render it impracticable and impossible for them to transact business with each other, or to consult together upon any business proposition; <sup>324</sup> 3. That the corporation is indebted to each of the stockholders in the sum of five thousand five hundred dollars, and by reason of the feeling existing between these parties, no provision has been made or can be made for the liquidation of this indebtedness; 4. That no adequate provision can be made for the maintenance, operation, and continuance of the newspapers published by the corporation in Wisconsin and Missouri; 5. That the business of the corporation cannot be carried on as intended and provided for in its articles of incorporation, and that the objects of the corporation, and the intendment of its stockholders, are completely frustrated. These are the substance of the allegations of the petition. The evidence adduced in support of them shows that the state of feeling between these men is very bitter, and that they scarcely ever meet without some fuel being added to the flame. But it seems that their trouble grew out of, and largely, if not wholly, relates to, the management and control of the Homestead Company. Various and sundry disagreements arose between Pierce and Wallace as to the conduct and policy of this paper; and Wallace, who was until recently its editor, was finally deposed by action of its board of control. This and numerous other suits followed, and a train of unfortunate litigation is impending.

In considering the case we must carefully distinguish between the various corporations which are more or less involved in the proceedings. The suit is against Pierce and the Pierce-Wallace Publishing Company; not against the Homestead Company, nor its stockholders or officers. Of it, therefore, we have no jurisdiction. And we should approve of no order which will have the effect of controlling its management or directing its affairs, unless it of necessity results from giving effect to a proper order made in a proceeding against the Pierce-Wallace <sup>325</sup> company. The only difference between the parties relating to the Pierce-Wallace company, grew out of the publication, in the Wisconsin paper, of some essays delivered at a session of the Farmers' Institute, in that state, in advance of their official publication under the auspices of the dean of the University of Wisconsin. This difference arose in May, 1894, more than one year prior to

the bringing of this suit, and seems to have been satisfactorily adjusted; at least the parties continued in business for many months after this dispute, and it was so inconsequential in character that no court would be justified in appointing a receiver on account of it. Wallace says that Pierce deposited all the funds of both the Homestead Company and the Pierce-Wallace company in his own name, and assumed all the duties of treasurer of both corporations, although he (Wallace) was the duly elected treasurer. The record discloses that Pierce did deposit the funds of both corporations in his own name, and for a time drew his checks against the deposits; that this was done at the suggestion of Wallace, or at least with his acquiescence, until more serious difficulties arose between the parties as to the conduct and management of the Homestead Company, at which time Wallace insisted upon recognition of his rights as treasurer. His demands were acceded to in so far as the depositing of the funds was concerned, with some little delay, which is at least partially explained; and at the time of the commencement of this suit the funds of the Pierce-Wallace company were deposited in the name of that company. After Wallace's deposition as editor of the "Homestead," he brought a suit to compel Pierce to turn over to him, as treasurer, the funds of the Pierce-Wallace company. After the suit was commenced, Pierce agreed to turn over these funds, and, for aught that appears in the record, this agreement has been complied with.

<sup>326</sup> These are all the matters of difference between these parties as to the Pierce-Wallace company, and it is manifest from the order made by the lower court, that he did not regard them as sufficient to justify the appointment of a receiver of all property of this corporation, for he directed the receiver to take charge of nothing but the one hundred and eighteen shares of stock of the Homestead Company. And, if there were any doubts about the matter, they would be dispelled by appellee's own testimony, wherein he says: "We have never had any disagreement with reference to the matters of the Pierce-Wallace Publishing Company except the one I have referred to. We continued to run the affairs of this company from February, when this controversy arose, until February in the next year. During this year there was never a controversy with reference to any matter pertaining to the Pierce-Wallace company's affairs, except at the very start in this Wisconsin business, for the reason that during that year, after this started, I knew little or nothing about the affairs of the company. I do not know whether we



would have had a controversy if I had known anything about it. I stated that as the reason why we did not have a controversy. I do not know any more about them now than I did then." It is perfectly apparent, that appellee has no right to a dissolution of the Pierce-Wallace company, and that a receiver should not be appointed for all its property, nor any part of it, unless there be something in the controversy with reference to the Homestead Company matters which is a justification for the order authorizing the receiver to take charge of the stock of that company, owned by the Pierce-Wallace corporation.

With reference to the Homestead Company, we find there are decided differences between the members of that company, which are, apparently irreconcilable; <sup>327</sup> but they relate to matters intra vires, and, except, as hereafter noted, do not have reference to the Pierce-Wallace company. These disputes are quite largely, if not wholly, related to the editorial management of the newspaper published by the Homestead Company; Wallace insisting that he should control the utterances of that department, while Pierce, and the other stockholders and directors, were asserting the right of supervision, and, to a certain extent, at least, control, of the editorial columns. The breach caused by this difference widened until it led to the deposition of plaintiff, by the regular vote of the directors of the corporation, from the editorial management of the paper. Now, without going into the merits of this unfortunate controversy, and without indicating our views as to who is at fault, we simply say, that if it be conceded that the managers and directors of the Homestead Company were at fault, it would give the plaintiff no right to the appointment of the receiver. The Homestead Company is not a party to this suit. It is an independent corporation, composed of different stockholders from those who own the stock in the Pierce-Wallace company, and is managed by other officers. Again, no actionable fraud is charged against the officers of the Homestead Company. Plaintiff was deposed by a regular majority vote, and as a minority stockholder or officer, he has no cause for complaint. It is a general rule that a minority cannot dictate the policy of the corporation, and no interference with its management in their behalf can be justified, unless it be absolutely necessary to the attainment of justice: *Peatman v. Centerville etc. Power Co.*, 100 Iowa, 245. But we have already said too much as to the power to appoint a receiver for the Homestead Company, for such relief is not asked, and the receiver was not granted in a suit against it. <sup>328</sup> The appoint-

ment was made with directions to the receiver to take charge of a part of the property of the Pierce-Wallace company, to wit, the stock owned by it in the Homestead Company; and the part of this opinion referring to this last-named corporation is designed to make plain the difference which exists in these two bodies, and to show, if we can, that a dispute as to the management of the Homestead Company will not of itself authorize the appointment of a receiver for the other corporation. We take it from the record that the lower court concluded that there were such differences between Pierce and Wallace as to the management of the Homestead Company that they could not act together in matters relating to the Pierce-Wallace company, and could not properly represent the latter corporation in the meetings of the Homestead Company; and it seems that the receiver was appointed in order that it might be represented at the meetings of the stockholders of the Homestead corporation. It further appears that the court below did not think there were such differences as would hinder the Pierce-Wallace corporation in the exercise of its functions, except in relation to the Homestead stock, for he denied the receivership as to all the property save this stock; and we may say, in justification of the court's refusal, that we think it was right in so doing. Plaintiff has not been denied any right in this corporation. He is still at liberty to handle the funds and to perform his duties as a stockholder, director, and officer. What have we, then, as to the management of the stock in the Homestead Company?

It appears that after Wallace's deposition as editor of the "Homestead" paper, he demanded a meeting of the board of directors. Pierce called the meeting, but Wallace was out of town. It is said that Pierce did <sup>329</sup> not know of his absence, but this is immaterial, for the reason that a second meeting was called shortly afterward, when Wallace was in the city, and this he refused to attend. As soon as the meeting was called, Pierce drew up a resolution, which gave to each of the parties a proxy to vote one-half of the Homestead Company stock at the meeting of that corporation. This resolution was submitted to Wallace in advance of the meeting, as indicating Pierce's views; and it seems that Pierce was anxious that all matters with reference to the action of this corporation should be agreed upon, to avoid any possibility of difficulty. Now, it seems to be held by some of the English courts that a receiver will be appointed where there is such a dispute among the members of a governing body as prevents the affairs being carried on properly: See Feather-

stone v. Cooke, L. R. 16 Eq. 298; 2 Cook on Stocks, Stockholders, and Corporate Law, sec. 684; Morawetz on Private Corporations, secs. 284, 285. Mr. Cook says, however, the court will not interfere unless the corporation is in a condition in which there is no proper governing body, or there are such dissensions in the governing body, as that it is impossible to carry on the business with advantage to the parties interested. "In such a case the court will interfere, but only for a limited time, and to as small an extent as possible." There are other authorities holding to a contrary doctrine: American Loan etc. Co. v. Toledo etc. Ry. Co., 29 Fed. Rep. 416; Little Warrior Coal Co. v. Hooper, 105 Ala. 665; Einstein v. Rosenfeld, 38 N. J. Eq. 309. And it is manifest that courts are loath to appoint a receiver for the mere purpose of carrying on the business of a corporation which is being conducted by its proper officers, although not to the profit or satisfaction of its stockholders, for the reason, as said by Judge Thompson, in his work on Corporations, at section 6834, "that the sovereign does not furnish public agencies for the <sup>330</sup> carrying on of private enterprises." But, whatever may be the true rule with reference to this matter, it appears that the Pierce-Wallace company is being managed by the officers selected for that purpose, just as it was before plaintiff was deposed, except that he has voluntarily refused to attend its meetings, or to participate in the management of its business. There has been no such disagreement between the officers of this corporation, with reference to its affairs, as to render it impossible for it to carry on the business for which it was organized. The record shows but one meeting of the directors after plaintiff's deposition as editor of the "Homestead," and this he refused to attend. Not, as we understand it, because of any disagreement between the directors or stockholders as to the management of this corporation, but because of the effect it might have upon the affairs of the Homestead Company. Evidence is abundant to the effect that all essential differences grew out of difficulties which arose with reference to the management of the "Homestead"; and that these litigants are not at variance with reference to the management of the Pierce-Wallace company. Plaintiff, as we believe, failed to attend the meetings of the latter corporation simply because he did not wish to have the stock held by it in the Homestead Company represented at the meeting of this last-named concern, and would not agree to the appointment of proxies, as suggested by Pierce, solely because of the effect it might have upon the "Homestead" difficulty.



Whether there will, in the future, be such dissensions and differences between these parties as will authorize the appointment of a receiver—conceding that one may be appointed for these causes—is almost wholly a matter of conjecture. It does not follow that because of trouble in the management of the “Homestead,” the business of the defendant corporation cannot <sup>331</sup> be carried on. If differences should arise in the future, it will then be time to consider the rights of the parties. We have already mentioned the fact that claim is made that the corporation is indebted to plaintiff and defendant Pierce. The evidence established this claim. But it does not appear that this indebtedness has been reduced to judgment, or that any lien exists against the property of the corporation. And it is clearly shown that the corporation is perfectly solvent, and able to meet its obligations. Plaintiff has no right as a creditor to the appointment of a receiver. This is a familiar doctrine and requires no citation of authorities to support it.

Reference has been made to the case of *Dickerson v. Cass County Bank*, 95 Iowa, 392. In that case it was found that there was such an action pending as justified the appointment of a receiver. It appeared, however, that the corporation was insolvent; that the officers were continuing the business at a loss, and were allowing the assets to be scattered, so that they could not be realized upon without great sacrifice; and that plaintiff, as a stockholder, was subject to a double liability under our statute. No one of these facts are present in this case. The only claim which has any merit is that there are dissensions among the stockholders and directors which render it impossible for the corporation to carry on its business.

The relief asked is, in effect, the dissolution of the corporation, or, if this be not the prayer, it is that the management of the corporation be taken out of the hands of the officers who have been conducting its business, and placed in the hands of an officer of the court for some indefinite period. It has already been seen that this is rarely, if ever, done; and, if such practice should be approved in this court, it is well to inquire, how long should the receivership be continued? There are but two stockholders <sup>332</sup> in this corporation, plaintiff Wallace and defendant Pierce. Now, a court of equity has no power to make them agree; and, if their differences are such as that it is impossible for them to carry on their business, it is not likely that the appointment of a receiver will bring about a reconciliation. It is practically conceded that a court of equity has no power, in the

absence of a statute, to dissolve a going corporation. What, then, must result? Either that a court must carry on this business for the interest of the stockholders until the corporation is dissolved by lapse of time, or that one of the parties should sell his stock, or such portion thereof, as will give a majority to one or the other of these litigants. We have already seen from the cases cited, that it is with great reluctance that, any court authorizes the appointment of a receiver because of dissension in the governing bodies, and when it does "it will only interfere for a limited length of time, and to as small an extent as possible." It is not necessary to decide whether the rule announced in *Featherstone v. Coke*, L. R. 16 Eq. 298, is applicable in a state where the statute enumerates the causes for which a receiver may be appointed, for, if we accept it as correct doctrine, we do not think it applies to the facts of this case. It may be unfortunate that there is no remedy other than a sale of his stock by one or the other of the stockholders, but, if this be the case, it is a situation into which the parties voluntarily placed themselves; and, so long as no actual legal wrong is committed by either, they must be content with their condition. Our conclusions find support in the following, among other authorities: *Hinkley v. Blethen*, 78 Me. 221; *Pond v. Vermont etc. R. R. Co.*, 12 Blatchf. 280, Fed. Cas. No. 11,265; *State v. Ross*, 122 Mo. 435; *Loomis v. McKenzie*, 31 Iowa, 425; *People v. Weigley*, 155 Ill. 491; <sup>333</sup> *Strong v. McCagg*, 55 Wis. 624; *Hinckley v. Pfister*, 83 Wis. 64; *French Bank case*, 53 Cal. 495; *Republican Mountain Silver Mines v. Brown*, 7 C. C. A. 412 (58 Fed. Rep. 644); *Spelling on Private Corporations*, sec. 851; *Jones v. Bank of Leadville*, 10 Colo. 464. The district court was in error in appointing the receiver and its order is reversed.

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**CORPORATIONS — DISSOLUTION OF—JURISDICTION OF EQUITY.**—A corporation cannot be dissolved by a court of equity, unless the power to declare such dissolution is conferred by statute: *Mason v. Supreme Court*, 77 Md. 483; 39 Am. St. Rep. 433; *Society v. Morris Canal Co.*, 1 N. J. L. 157; 21 Am. Dec. 41, and note; monographic note to *Folger v. Columbian Ins. Co.*, 96 Am. Dec. 756.

**RECEIVERS—APPOINTMENT OF.**—The appointment of a receiver is, as a general rule, discretionary: *Fort Payne Furnace Co. v. Fort Payne Coal etc. Co.*, 96 Ala. 472; 38 Am. St. Rep. 109, and note. A receiver will not be appointed to take charge of a beneficial corporation, and to administer its assets where it is not alleged to be insolvent: *Mason v. Supreme Court*, 77 Md. 483; 39 Am. St. Rep. 433. See *Havemeyer v. Superior Court*, 84 Cal. 327; 18 Am. St. Rep. 192. The general subject is considered in the monographic note to *Cortleyeu v. Hathaway*, 64 Am. Dec. 482-494.

## GERMAN SAVINGS BANK v. CITIZENS' NATIONAL BANK.

[101 Iowa, 530.]

**PLACE OF TRIAL—INTERVENTION.**—Where an action was properly brought in the county in which the defendants resided, and an intervention was allowed in favor of a party who may be liable to the defendant in the event of a recovery against him, the intervenor is not entitled to an order changing the place of trial to the county of his residence.

**BANKING—RIGHT TO RECOVER FOR PAYMENT OF FORGED CHECK.**—If a bank draws a check in favor of a third person, who has no knowledge thereof, and whose name is thereafter forged thereon, and the check cashed by another bank, which, in turn, sends it to a third for collection, and the latter charges the amount thereof against the drawer's deposit account with it, the drawer may recover the sum so wrongfully charged against its account.

**TRIAL, CHANGE OF PLACE OF BECAUSE OF LOCAL PREJUDICE.**—Under the statutes of Iowa, a change of the place of trial because of local prejudice must be applied for before any continuance has been granted for any cause, unless the applicant was ignorant of such local prejudice at the time of the prior granting of the continuances.

**A BANK PAYING A CHECK UPON A FORGED INDORSEMENT** and charging the amount thereof to the account of the drawer is liable to him, if the amount was wrongfully charged to his account, where the check has never been delivered to the payee.

**A DRAWER OF A CHECK IS NOT ESTOPPED** from recovering moneys paid on a forged indorsement thereof, and wrongfully charged to his account, by the fact that he had stated to the person thus paying the check that he had made a loan to the payee, if, at the time of making such statement, he believed it to be true.

**PRINCIPAL AND AGENT—FORGERY BY AGENT.**—If an agent intrusted with a check drawn by his principal, to be delivered to the payee named therein, forges his indorsement and succeeds in cashing the check, his act cannot bind his principal, nor estop the latter from recovering from the bank which had cashed such check and charged it to the drawer's account.

**A BANK IS NOT GUILTY OF NEGLIGENCE** in not discovering, for nearly a year, that a check drawn by it and paid by another bank and charged to the drawer's account had been paid upon a forged indorsement. It had a right to assume that the bank thus making payment had satisfied itself of the genuineness of the indorsement.

**BANKING—FORGED CHECKS.—A DEPOSITOR DOES NOT OWE** any duty to a bank to examine his pass-book and checks for the purpose of detecting forgeries of the payee's name on checks drawn by such depositor.

**JURY TRIAL.—A COURT IS NOT BOUND TO SUBMIT TO THE JURY MATTERS** which, if established, would constitute no legal defense to a recovery, or as to which there was no evidence.

**BANKING—CHECKS, INQUIRIES RESPECTING, CONSTRUCTION OF.**—If a bank which has drawn a check is asked over the telephone whether it has issued a check in favor of a designated person, and whether it is all right, and answers in the affirmative, it does not thereby affirm that the indorsement of the payee's name on the check, which indorsement it has never seen,



is genuine, nor that the person presenting the check is entitled to receive payment. Such an inquiry would ordinarily be understood as applying only to the validity of the drawer's signature, and to the question whether there were moneys with which to meet the check.

**INTEREST, WHEN RECOVERABLE.**—If a check is paid upon a forged indorsement and the amount thereof wrongfully charged to a depositor, who thereafter sues to recover the amount thus wrongfully deducted from his deposit account, he is entitled to recover interest from the date of such charge, though his deposit could not draw interest.

**JURY TRIAL.**—A COURT MAY PROPERLY REFUSE TO SUBMIT to a jury interrogatories which, however answered, could not have controlled or changed the verdict, or have resulted in a finding necessarily determinative of the cause.

**EVIDENCE, TELEPHONE MESSAGE.**—Where a witness claims that he had a conversation over the telephone with a representative of the plaintiff, he cannot, in support of his statement of such conversation, prove what he repeated at the time to a third person as the answers received over the telephone.

**JURY TRIAL—COERCING A VERDICT.**—Though, after the jurors have been out some twenty-two hours, the judge tells them that the cause was submitted to them for decision and not for disagreement, and that he will give them a further trial, he cannot be regarded as having coerced a verdict.

Action commenced in May, 1894, in the circuit court of Scott county by the German Savings Bank against the Citizens' National Bank of Davenport, in which the City National Bank of Clinton was permitted to intervene, to recover an amount alleged to have been wrongfully charged to the deposit account of the plaintiff by the defendant corporation. This check was drawn in favor of William Quinlan and sent to one McLaughlin, who claimed to be the payee's agent and who forged the latter's name upon the check and presented it to the intervenor, which, after some communication with the plaintiff's officers, cashed the check and indorsed it for collection to the defendant. The defendant thereupon charged the amount of the check to the plaintiff, which then had more than that amount on deposit with the defendant. All this occurred in February, 1893. The plaintiff had received a note and mortgage purporting to have been signed by Quinlan, and supposed it was loaning him the amount for which it drew its check. The note and mortgage had, however, also been forged by McLaughlin. In February, 1894, Quinlan was for the first time informed of the check, note, and mortgage, and at once repudiated the whole transaction. McLaughlin, in the meantime, committed suicide and died insolvent. None of the officers of any of the parties to the action had ever seen Quinlan. The plaintiff, upon discovering the facts, claimed that the defendant had, without authority, appropriated

to its own use so much of the deposit to its account with the defendant as had been by the latter applied in payment of the check. The defendant, upon the commencement of the action, gave notice thereof to the intervenor that it would be held liable for any sum recovered by the plaintiff. The intervenor at once employed counsel to defend the action, and afterward intervened. The jury returned a verdict in favor of the plaintiff and against the defendant, upon which judgment was subsequently entered, from which both the defendant and the intervenor appealed.

L. A. Ellis and Davison & Lane, for the appellants.

Julius Lischer and Bills & Hass, for the appellee.

536 KINNE, C. J. 1. After the City National Bank had intervened in this action, it filed a motion for the removal of the cause to Clinton county, the place of residence of said intervenor. This application for a change of the place of trial was made under section 2586 of the code, which provides for the bringing of personal actions in a county wherein some of the defendants actually reside. Intervenor's thought is that it is the real party in interest, and that the defendant, the Citizens' National Bank is a nominal party, only, and made a party solely for the purpose of giving the district court of Scott county jurisdiction of the action. The motion was overruled, and error is assigned thereon. We think the ruling was correct.

Counsel for appellants rely upon several cases, which may be briefly considered. *Howell v. Stetefeldt Furnace Co.*, 69 Cal. 153, was a case where the company, claiming a residence in San Francisco, held two thousand dollars, to which it made no claim. Howell, the plaintiff, lived in Santa Barbara county, and brought his action there against the furnace company, claiming the money. In accordance with the provisions of the statute of California, the furnace company paid the money into court, and procured one Thompson, the claimant of it, to be substituted as sole defendant in the case. After Thompson had thus become the only defendant, he moved to transfer the case to San Francisco, the place of his residence. It was held that the lower court erred in not sustaining the motion. In the opinion, stress is laid upon the fact that Thompson did not voluntarily place himself under the provisions of the statute, and the fact that 537 he was the only defendant in the case. *Buell v. Dodge*, 57 Cal. 645, was a case where two parties were made defendants, but the complaint stated a cause of action against only one of them, and it was

held he was entitled to a change of venue to his own county. Troy etc. Mill Co. v. Bowen, 7 Iowa, 465, is also relied upon. In that case the holding was that the defendants spoken of in the statute must be persons having an actual, real, and positive interest in the cause, and not those who consent to be made use of to defraud the real parties.

None of these cases are applicable to the facts in the case at bar. If the action was rightfully brought, in the first instance, against the Citizens' National Bank, and if it was liable to the plaintiff upon the cause of action stated in the petition, then the district court of Scott county had jurisdiction, and its right to hear and determine the cause could not be taken away because thereafter the intervenor became a party to the suit, and might ultimately be required to reimburse the Citizens' National Bank for money paid by it on the check. Was plaintiff's action properly brought against the Citizens' National Bank? Plaintiff's claim was that said bank had converted its money, and refused to pay it over. Plaintiff was not required to follow the money, which said defendant had improperly paid out on forged indorsement of plaintiff's check, and recover it from some one who had thus wrongfully received it. We think it clear that plaintiff's remedy was properly sought against the bank which had, without warrant therefor, paid out the money. It cannot be doubted that, when plaintiff deposited its eight thousand dollars with the Citizens' National Bank, it parted with the ownership of its money, and said Citizens' bank became plaintiff's debtor to that amount: Independent Dist. v. King, 80 Iowa, 497. <sup>538</sup> Therefore, in paying said eight thousand dollars to intervenor, upon the faith of a forged indorsement, it paid its own money. Such being the fact, plaintiff would have no cause of action against the intervenor. In Bank of British North America v. Merchants' Nat. Bank, 91 N. Y. 106, wherein the facts were similar to those in the case at bar, the court said: "The defendant was bound to see to it at its peril that the indorsement of Mrs. Halpin (the payee of the check) was genuine; that it paid the check to one entitled to the payment thereof; and that it got good title to the check as a voucher, and the loss, as between it and the plaintiff (the drawer of the check), for wrongful payment, must fall upon it." The same question was presented in the case of Corn Ex. Bank v. Nassau Bank, 91 N. Y. 74; 43 Am. Rep. 655. It appeared in that case that Kunhardt & Co., deposited money in the Corn Exchange Bank. They drew a check for nineteen thousand dollars to the order of William Ives



and John Waters. The Nassau Bank cashed the check on a forged indorsement of the names of the payees, and the Corn Exchange Bank paid it to the Nassau Bank. Kunhardt & Co. sued the Corn Exchange Bank for their deposit. That bank notified the Nassau Bank, as was done in this case by the Citizens' National Bank, to intervenor. The plaintiffs recovered against the Corn Exchange Bank. Thereafter, the latter brought suit against the Nassau Bank to recover the money it had paid on the forged check. It was held in that case that there was no privity between Kunhardt & Co. and the Nassau Bank; that the money received by it was not their money, and that it was not liable to them. It was said that "their money was still on deposit with the plaintiff, and the plaintiff owed them for it." These cases show that the Citizens' National Bank was properly sued by plaintiff. No action was brought against intervenor, <sup>539</sup> no recovery was sought from it, and it did not occupy such a position as to entitle it to be substituted for the original defendant. Suppose the plaintiff had made the intervenor a party defendant with the Citizens' National Bank, could intervenor have demanded a change of place of trial to the place of its residence? We think not. Certain it is intervenor can have no greater rights in that respect than it would have had in the supposed case. Having stated a good cause of action against the defendant, plaintiff was entitled to a trial in Scott county, as against such defendant, regardless of the intervention of the City National Bank of Clinton.

2. After the court had overruled the application for a change of the place of trial heretofore mentioned, the intervenor answered, setting out substantially the same defenses as had been pleaded by the defendant, the Citizens' National Bank; whereupon the intervenor made an application for a change of the place of trial, upon the ground of local prejudice, under section 2590 of the code. It may be, if this application and the showing made in its support had been made in time, that it should have been granted. But the statute requires such an application to be made before a continuance of the case has been had, and it is not allowed after such continuance, except for a cause or causes not known to the affiant before such continuance: Code, sec. 2591. This application was made after the case had been three times continued, and it does not appear that the causes for the application were not fully known to affiants long prior to such continuances. For this reason the application was properly overruled.

3. It is said that the court erred in not submitting all the issues to the jury; that other issues, as to which it is claimed there was evidence, were material; and that the jury should have been instructed as to <sup>540</sup> them. The answers of the defendant and of the intervenor presented substantially the following defenses: 1. That plaintiff bank reported to defendant bank that it had made a loan to Quinlan, and was therefore estopped from denying that the check had been wrongfully paid; 2. That McLaughlin, in the loan transaction, acted as plaintiff's agent; 3. That plaintiff was negligent in not informing intervenor that it had dealt only with McLaughlin; 4. That plaintiff was negligent in not informing intervenor fully touching the check. In each division of the answer it is alleged that intervenor paid the check upon the direction of the plaintiff. The evidence on part of the defendant and intervenor tended to show that plaintiff said it had made a loan to Quinlan. They then supposed that they had made such a loan. Because it appears thereafter that McLaughlin forged the application, the mortgage, the acknowledgment, and the recorder's certificate, does not estop plaintiff from now seeking to recover its deposit with the defendant. The case is not different from what it would be had Quinlan actually negotiated the loan for himself, and McLaughlin had improperly obtained the check, and forged Quinlan's name, and drawn the money thereon, as he in fact did.

It is said that McLaughlin was acting as the agent of plaintiff, and it is responsible for his act in forging Quinlan's name on the check. If it should be conceded that McLaughlin was so acting as plaintiff's agent, he could not bind his principal by making a forged indorsement on the check of the payees named: See *Welsh v. German etc. Bank*, 73 N. Y. 424; 29 Am. Rep. 175. In the case of *Citizens' Nat. Bank v. Importers and Traders' Bank*, 119 N. Y. 195, the forgery was committed by the bookkeeper of the payees named in the drafts. The payees, Wadsworth & Co., bought drafts <sup>541</sup> from the plaintiff bank to remit to their creditors in payment of amounts due the latter. They indorsed the drafts, and delivered them to their bookkeeper, to be mailed to the proper parties. He erased the indorsements, forged others, and used the paper for his own purposes. The court said: "In the first place, we must regard the paper as never having been paid by defendant to the order of the plaintiff, for the rule is well and long established that a forged indorsement does not pass a title to commercial paper, negotiable only by indorsement; and payment by the drawee,

although in good faith, of a draft so affected, is no payment at all as to the true owners: *Graves v. American Ex. Bank*, 17 N. Y. 205. It was the defendant's business to see to it that its depositor's moneys were expended according to its directions, and every expenditure was at the defendant's risk of the direction being valid, and of the indorsement conveying title to the holder being genuine." The case of *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731, was, like the one at the bar, brought to recover a deposit claimed to have been paid out on forged checks. The forgery was committed by the confidential clerk of the depositor. The case was decided in favor of the plaintiff. This last case was followed and approved in *Welsh v. German etc. Bank*, 73 N. Y. 424; 29 Am. Rep. 175.

Nor is the claim well founded that the plaintiff was negligent. In the light of the authorities, there was no negligence on part of plaintiff. True, plaintiff did not discover the forgery for nearly a year after it had been accomplished. The check was returned with an apparent genuine indorsement of Quinlan. The fact that intervenor had paid the money thereon, and presumably had satisfied itself that the indorsement of Quinlan was genuine, as it was in duty bound to do, was a further reason why plaintiff should not, in the absence of knowledge to the contrary, have concerned itself as to the genuineness <sup>542</sup> of the indorsement of Quinlan's name thereon. Furthermore, the plaintiff owed no duty to the defendant, or to the intervenor, as to the genuineness of the indorsement of Quinlan. This same contention was made in *Welsh v. German etc. Bank*, 73 N. Y. 424, 29 Am. Rep. 175, wherein the court held that a depositor owes no duty to a bank which requires him to examine his pass book or vouchers with a view to a detection of forgeries of his name. "Whatever loss the bank has sustained it has suffered from its own negligence or want of skill in a matter in which, in the first instance, it, and it only, was bound to exercise care and diligence. To this loss no act of Weisser has contributed. He was guilty of no bad faith. He has violated no duty which he owed to the bank, and is in no way responsible. He had a right to assume that the bank had discharged its own duty to itself, and was not bound to conceive it possible that the bank had charged him with money which had not been paid upon his order. He was under no contract to examine with diligence his returned checks and bank book": See, also, *Humboldt State Bank v. Rossing*, 95 Iowa, 1.



Counsel for appellants cite many cases which are claimed to support the theory that plaintiff was guilty of such negligence as should preclude it from recovery. *Coggill v. American Ex. Bank*, 1 N. Y. 113, 49 Am. Dec. 310, was a case where the drawer of a bill forged the indorsement of the payee, and procured the money on it from a bank, and the drawee accepted and paid the bill to the bank; and it was held that he could not, because of the forgery, recover the money back from the bank; that the bank acquired good title to the paper from the drawer, he having negotiated it. *Meacher v. Fort*, 30 Am. Dec. 364, is a like case. Such a bill is treated as drawn in favor of a fictitious person. Cases are cited where it is held that if the payee or drawer's conduct has been such as is calculated to mislead the bank <sup>543</sup> which cashed the check, or has prevented it from making the usual scrutiny against fraud, it would be such negligence as should prevent a recovery; *Rouvant v. San Antonio Nat. Bank*, 63 Tex. 610; *National Bank v. Bangs*, 106 Mass. 444; 8 Am. Rep. 349; *De Feriet v. Bank of America*, 23 La. Ann. 310; 8 Am. Rep. 597; *Daniel on Negotiable Instruments*, sec. 1657. An examination of these cases shows that they are not authority in support of appellants' contention in this case, under the facts disclosed in this record. The evidence fails to show that there was any negligence on the part of the plaintiff. The court was not bound to submit to the jury matters which, if established, would constitute no legal defense to a recovery, or as to which there was no evidence. We think there was no error in the respect complained of.

4. Before the City bank paid the check, its cashier had a telephonic communication with a representative of plaintiff's bank in relation to said check. Intervenor claims that in that conversation, and after being advised that McLaughlin was at its bank with a check for eight thousand dollars, in favor of William Quinlan, whom McLaughlin said plaintiff had made a loan to, plaintiff said it had issued such a check, and had made such a loan, that it said: "The check is all right"; that intervenor said: "Shall we cash it? Will it be all right if we do?" that the reply was: "It will be all right to cash it." Mr. Lischer, who represented plaintiff at the Davenport end of the telephone line, states the conversation somewhat differently from intervenor's cashier. He says he said his bank had issued such a check of eight thousand dollars, in favor of William Quinlan, and that "the check is all right."

Now, the court instructed the jury that the burden of proof

was on the defendant, and, in order to defeat plaintiff's claim, it must establish, by a preponderance of the evidence, that the payment of said <sup>544</sup> check by the City National Bank to McLaughlin was rightful, and justified by law; that the only question they should determine was whether the plaintiff, in the conversation over the telephone, authorized the City bank to pay said check, in the condition it then was, to McLaughlin. He also told them that ordinarily it is the duty of a bank to whom a check payable to order is presented for payment to ascertain at its peril the title of the person presenting it, and his right to receive the money thereon, and that, if such title purported to come through an indorsement, the bank to whom the check is presented for payment must, at its peril, know that such indorsement is genuine before it will be protected in advancing money on such paper; that such rule must prevail in this case, unless they found that the City bank was induced to advance its money on the check by some act or declaration of the plaintiff, which act or declaration was reasonably calculated to, and did, cause the City bank to advance the money, without informing itself of the title or right of the person presenting the check. Touching this telephone conversation, he further instructed the jury that ordinarily, any inquiry in relation to the check by the intervenor, propounded to the plaintiff, could properly be construed by the latter as relating only to the validity of its signature, and whether it had funds to meet said check, and that nothing more than this information would be understood as being sought, unless specially and plainly asked, and that, after determining what the conversation through the telephone was, they should ascertain and find, in the light of all the surrounding circumstances, whether the City National Bank sought to learn from plaintiff if it (the City National Bank) might safely pay said check without investigation or inquiry as to McLaughlin's title thereto, or the genuineness of Quinlan's name upon the back, and also <sup>545</sup> whether the plaintiff bank, knowing what the City bank sought, so responded as to reasonably induce said City bank to believe that it was authorized so to do; that, if the City bank paid the check without being misled by the plaintiff, they must find for the plaintiff. If, however, the City bank was induced to make the payment to McLaughlin without investigation on its part, by reason of plaintiff's response, then it would not be liable.

The above is a summary of the instructions given touching this matter. That they were correct we have no doubt, and

that they embodied the only real defense pleaded which was legally, under the evidence, available to the defendant and intervenor, we think is clear. These instructions were evidently based upon the holding in *Espy v. Bank*, 18 Wall. 604. Without quoting from that case, which is a leading one, we may say that it fully sustains the law as laid down in the instructions of the trial court in this case. As supporting the same doctrine, see *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67; 17 Am. Rep. 305; *White v. Continental Nat. Bank*, 64 N. Y. 316; 21 Am. Rep. 612; *Clews v. New York etc. Banking Assn.*, 89 N. Y. 418; 42 Am. Rep. 303.

5. Complaint is made of an instruction of the court to the effect that, if the jury found for the plaintiff, they should include in their verdict, interest on the amount of the check from the time the check was paid. There was no error in this division of the charge. While it appears that the plaintiff did not receive interest on its deposit account with the Citizens' National Bank, still, when said account was reduced by the payment of this check, plaintiff was compelled to supply its place with a like sum of money, in order to keep its deposit intact. Therefore it was deprived of the use of the money so wrongfully paid out. That interest is recoverable in such a case, see *Corn Ex. Bank v. 546 Nassau Bank*, 91 N. Y. 74; 43 Am. Rep. 655; 3 *Parsons on Contracts*, 102. And see, also, as bearing upon the question of the right to recover interest on money held by one and belonging to another, *Hubenthal v. Kennedy*, 76 Iowa, 707; *Risser v. Rathburn*, 71 Iowa, 113; *Goodnow v. Litchfield*, 63 Iowa, 275; *Mansfield v. Wilkerson*, 26 Iowa, 482.

6. Error is assigned upon the court's refusal to give certain instructions asked by appellants. They were intended to present the defendant and intervenor's theory of the case. In so far as they were proper, the thought contained in them was embodied in the instructions given by the court. As framed, they were objectionable, for reasons already stated.

7. Error is assigned upon the action of the court in refusing to submit twelve special interrogatories to the jury. We cannot set them out, as they cover two pages in print. As to these interrogatories, it may be said that if submitted to the jury, and answered favorably to defendant and intervenor, they could not, in view of the evidence, have controlled the general verdict; hence it was not error to refuse to submit them: *Dreher v. I. S. W. Ry. Co.*, 59 Iowa, 601; *Scagel v. Chicago etc. Ry. Co.*,



83 Iowa, 380. They were also properly refused because not calling for a finding of fact necessarily determinative of the case: *Hawley v. Chicago etc. Ry. Co.*, 71 Iowa, 717.

8. Defendant and intervenor sought to show by the witness Smith, who conversed over the telephone with plaintiff's representative, Lischer, what he (Smith) repeated to one Stone as the answers he received from Lischer. The evidence was rejected. We are cited to no authority in support of the appellant's claim that such evidence <sup>547</sup> is admissible, and we know of no rule which would warrant its admission.

9. After the jury had been out about twenty-two hours, they were called into the courtroom during a session of the court, and asked if they were unable to agree on account of any misunderstanding of the law of the case; and the foreman said that they understood the law and the facts, and were unable to agree, whereupon the court said to them, orally: "This case is submitted to you for decision, and not for disagreement. I think I will let you give it a further trial." It is contended that this statement was error. Counsel's thought seems to be that the language used was calculated to coerce the jury into agreeing upon a verdict. In *Niles v. Sprague*, 13 Iowa, 203, the jury was told "that it was important they should agree, if they could satisfy their minds as to the right of the case between the parties." It was held not error. In *Frandsen v. Chicago etc. Ry. Co.*, 36 Iowa, 372, it was held not error to instruct a jury which has failed to agree that it is the duty of each juror to lay aside all pride of opinion, and carefully review the ground of his opinion, and to direct them to return to their room, and examine their differences in a spirit of fairness. In *Giese v. Schultz*, 69 Wis. 521, the court said to the jury: "I cannot discharge you now. It is your duty to use every reasonable effort to come to an agreement." It was held not error. In *Jackson v. State*, 91 Wis. 253, the court said: "It is your duty to agree upon a verdict if that is possible." Held not error. In *Odetta v. State*, 90 Wis. 258, it is held that the court must have a broad discretion in such matters. The cases where directions to a jury touching an agreement have been held error have been where the language used has been such as indicated <sup>548</sup> an intention of coercing the jury into an agreement, or where the remarks of the trial judge were such as to impress the jury with the belief that the judge wanted the case decided in favor of a particular party to the suit: *North Dallas etc. Ry. Co. v. McCue* (Tex. Civ. App., May 13, 1896), 35 S. W. Rep. 1080; Ma-

honey v. San Francisco etc. Ry. Co., 110 Cal. 471. The language used by the trial judge in the case at bar was proper. The statement that the case was submitted to them for a decision was a statement of a fact, which, as jurors, they should have known in the absence of admonition to that effect by the court. The last part of the court's statement indicated simply that he thought the jury should make further efforts to agree. There was no suggestion that he would keep them together until they did agree. The end to be attained by a jury trial is a verdict, and it is desirable, from every point of view, that jurors agree, so that litigants may not be put to the annoyance and expense of more than one trial. Much discretion must be vested in the trial judge in such matters, and unless such discretion is abused, we should not interfere. In this case there was no impropriety in what the court said.

10. It is said that the court erred in refusing to let the jury take to their room certain letters which had been introduced in evidence. The record fails to show that appellants, when the jury retired, requested that they take the letters, and that the court refused such a request, and that an exception was taken to such a ruling. The question appears to have been raised for the first time in the motion to set aside the verdict, and for a new trial. It was too late: *Shields v. Guffey*, 9 Iowa, 322; *Turner v. Kelley*, 10 Iowa, 573. We have considered all of the questions argued. We discover no error in the rulings and holdings complained of, and the judgment of the district court is affirmed.

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**INTERVENTION—RIGHTS OF INTERVENOR.**—An intervenor must accept the suit as he finds it. If he does not like the form of the action, or the place where it is pending, he ought not to seek to become a party to it: *Monographic note to Brown v. Saul*, 16 Am. Dec. 180.

**BANKS—PAYMENT OF FORGED CHECKS—CHARGING TO DEPOSITOR'S ACCOUNT.**—Payment of forged checks by a bank is made at its peril, and it is not justified in charging them against the depositor's account, unless some negligent act of his in some way contributed to induce such payment in the first instance, or unless, by his subsequent conduct in relation to the matter, he is equitably estopped to deny the correctness of such payment: *Janin v. London etc. Bank*, 92 Cal. 14; 27 Am. St. Rep. 82, and note; *First Nat. Bank v. State Bank*, 22 Neb. 769; 3 Am. St. Rep. 294, and note. It is the duty of a depositor to know whether his account is correct or not, and promptly to report a forgery when detected; and if he negligently fails to make the examination and consequent discovery when he should have done so, it is as if he had expressly admitted the genuineness of the checks, and he will not be permitted to deny the fact, provided the bank be prejudiced by the failure: *Weinstein v. National Bank*, 69 Tex. 38; 5 Am. St.

Rep. 23, and note; First Nat. Bank v. Allen, 100 Ala. 476; 46 Am. St. Rep. 80, and note. See Janin v. London etc. Bank, 92 Cal. 14; 27 Am. St. Rep. 82, and extended note to People's Bank v. Franklin Bank, 17 Am. St. Rep. 889-899, on the rights and remedies of the several parties when a forged check has been paid.

**AGENCY—LIABILITY OF PRINCIPAL FOR AGENT'S FORGERY.**—Where one is special agent to sign his principal's name to a note for a certain specified amount, but he signs such name for twice the given sum, such act is mere forgery, and the principal is not liable on the note. The party who advances the money for the benefit of the agent, who signs it as drawer, is chargeable with notice of the want of genuineness of the note: King v. Sparks, 77 Ga. 285; 4 Am. St. Rep. 85, and note.

**EVIDENCE—TELEPHONE CONVERSATIONS.**—Conversations by telephone when pertinent are admissible in evidence: Missouri Pac. Ry. Co. v. Heidenheimer, 82 Tex. 195; 27 Am. St. Rep. 861, and note. As to the admissibility of such evidence in general, see note to Central Union Tel. Co. v. Falley, 10 Am. St. Rep. 135, 136; Oskamp v. Gadsden, 35 Neb. 7; 37 Am. St. Rep. 428, and note. Exceptions to the general rule of evidence excluding statements made by a party in his own favor ought not to be extended: Pinney v. Jones, 64 Conn. 545; 42 Am. St. Rep. 209.

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## MURDY v. SKYLES.

[101 Iowa, 549.]

**EXEMPTION OF PROCEEDS OF LIFE INSURANCE AGAINST DEBTS OF BENEFICIARY OR ASSIGNEE.**—Though the constitution provides that policies of insurance on the life of an individual shall inure to the separate use of the husband or wife or children of such individual, independently of his or her creditors, and an endowment policy payable to the assured on his attaining a certain age shall be exempt from liability for any of his or her debts, such exemption applies only against debts of the assured. Hence, if he turns over such moneys to his wife, they are subject to execution issued on a judgment against her. Exemption rights are personal, and cannot ordinarily be transmitted by sale or gift.

**HUSBAND AND WIFE ARE JOINTLY AND SEVERALLY LIABLE,** by the statutes of Iowa, for family expenses, as for medical services rendered the husband.

**EXEMPTION OF LIFE INSURANCE, WAIVER OF IN ADVANCE.**—An agreement at the time of incurring indebtedness to pay it out of the proceeds of life or endowment insurance is a waiver of the statutory right to hold the proceeds of such insurance exempt from execution.

**EVIDENCE, VARYING OR CONTRADICTING WRITING, WHAT IS NOT.**—Though a promissory note is made in favor of one person, parol evidence is admissible to prove that he was merely a trustee for another, and that the note was given in consideration of medical services rendered by the latter, and was accompanied by a parol agreement that it should be paid out of the proceeds of certain life or endowment policies to which the maker might become entitled.



T. B. Snyder and J. D. M. Hamilton, for the appellant.

Craig & Harrington, for the appellees.

**550** DEEMER, J. Plaintiff, who is a physician and surgeon, commenced this action against the defendants, who are husband and wife, to recover compensation for medical services rendered the husband, claiming that said services were a family expense chargeable upon the property of both husband and wife. In aid of his suit, he sued out a writ of attachment and caused the German Savings Bank to be garnisheed. The bank, in answer to the process, stated that it was indebted to defendant, Anna Skyles, in the sum of about four hundred dollars. The defendant, F. P. Skyles, in his answer admitted that he employed plaintiff to examine him on two occasions as a prerequisite to obtaining aid from an organization known as the "Brotherhood of Locomotive Firemen," and admits an indebtedness of ten dollars. And the defendants jointly pleaded a counterclaim for damages upon the attachment bond given by plaintiff, based upon allegations that the attachment was wrongfully sued out, and that the money in the hands of the bank was exempt as the avails of a certain policy **551** of insurance issued to F. P. Skyles. The plaintiff, in reply, denied the allegations of the counterclaim, and further pleaded that he and defendant, F. P. Skyles, made an arrangement or agreement by which plaintiff's bill should be paid out of the indemnity or insurance money. Thereafter, defendants filed a motion to dissolve the attachment and discharge the garnishee on the ground that the money held by the bank was exempt from seizure under attachment or execution. This motion was supported by an affidavit to the effect that F. P. Skyles was injured in a railway wreck, and that for the disability incurred he drew from the Brotherhood of Locomotive Firemen fifteen hundred dollars, which was deposited in the bank by his wife, who, he says, was the beneficiary under the policy. The affidavit also recites that Skyles was totally disabled, and that the money paid him was all he had to live on. Attached to this motion was a copy of the certificate of membership or policy of insurance issued by the Brotherhood of Locomotive Firemen, which, so far as material, reads as follows: "This certificate issued by the Grand Lodge of the Brotherhood of Locomotive Firemen, witnesseth: That Brother F. P. Skyles, a member of Nauvoo Lodge, No. 391, of said order, located at Fort Madison, Iowa, is entitled to all the rights, privileges, and benefits of membership, and to participate

in the beneficiary department to the amount of fifteen hundred dollars, which amount, in the event of his total disability, shall be paid to him, or in the event of his death, to Anna F. Skyles, his wife, whose residence is Fort Madison, Iowa. This certificate is issued on condition that said F. P. Skyles shall comply with all the laws, rules, and regulations of the order while a member of the same; otherwise, this certificate shall be canceled and become null and <sup>552</sup> void." This motion was submitted in connection with the pleadings in the case, and was by the court sustained. The appeal is from the ruling on this motion.

The questions presented involve a construction of section 1182 of the Code, which is as follows: "A policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, shall inure to the separate use of the husband or wife and children of said individual, independently of his or her creditors; and an endowment policy, payable to the assured on attaining a certain age, shall be exempt from liability for any of his or her debts." This section was amended by the twenty-fourth general assembly as follows: "And the avails of all policies of insurance on the life of any individual, payable to his surviving widow, shall be exempt from liabilities for all debts of such beneficiary contracted prior to the death of the assured; provided, that in any case the total exemption for the benefit of any one person under the provisions of this section shall not exceed the sum of five thousand dollars." Appellee claims that, under the facts shown, the avails of the certificate which we have just set out are exempt, under this statute and the amendment thereto. The certificate issued to defendant F. P. Skyles gave him membership in an organization which promised to pay him, in the event of his total disability, the sum of fifteen hundred dollars, or, in the event of his death, a like sum to his wife. The record does not clearly disclose the character of the organization which issued the certificate, but, from the allegations in the pleadings, and the proofs offered, we must presume that it is an insurance company, and that it agreed to pay indemnity to the persons named in the event of the death or total disability of the assured. The contract is, then, to all intents and purposes, a policy of insurance on the life of Skyles, <sup>553</sup> and it is also a contract of indemnity in which the assurer agrees to pay a certain sum in the event of the total disability of F. P. Skyles. Appellant's counsel say that it is a contract of accident insurance, but there is nothing in the record which so shows, and we must treat it as an ordinary

contract of insurance against death and total disability, from whatever cause. Payment under the policy, however, is to be made upon two separate and distinct contingencies—one the death of the assured, and the other his total disablement—in the former case to the wife of the assured, and in the latter to the assured himself. Appellant contends that, as the payment was made upon the latter contingency, the statute in question does not apply, for the reason that it was not made upon a life insurance policy. In view of what follows, we do not find it necessary to consider this question. The statute says, in effect, that a life insurance policy shall inure to the separate use of the wife and children of the assured, independent of his debts. Now, we have frequently held that section 1182, before its amendment, did not exempt the avails of a policy of insurance from the debts of the beneficiary, when such beneficiary is a person other than the assured: *Murray v. Wells*, 53 Iowa, 256; *Smedley v. Felt*, 43 Iowa, 607. The amendment to the statute was to meet these decisions, but as we shall hereafter see, it does not apply to the facts of this case. If by any process of construction it could be held that the money was exempt to the assured, yet it does not follow that the motion was correctly sustained. The facts are that the money was deposited by the defendant Anna Skyles, the garnishee answered that it was indebted to her and not the insured, and the defendants pleaded that the money was and is the property of the wife. F. P. Skyles is not, therefore, claiming <sup>554</sup> the property as exempt to him, and it is well settled that his wife cannot claim the money as exempt to her husband under the facts disclosed by this record. The right is purely personal, and cannot, ordinarily, be transmitted by sale or gift: *Thompson on Homesteads and Exemptions*, sec. 870.

But if it be conceded that the wife can claim the exemption for her husband, the question yet remains, Can she claim it as exempt from debts of her own? This action was brought against both the husband and wife to recover the amount of a claim for medical services rendered the husband. Now, we have held that such a claim is a family expense, for which the husband and wife are jointly and severally liable: *Smedley v. Felt*, 41 Iowa, 588, 43 Iowa, 607; *Schrader v. Hoover*, 80 Iowa, 243. Unless, then, there is some statute which exempts the funds in her hands, it should be subjected to whatever judgment plaintiff may recover against her. We have already seen that the statute, as it stood before the amendment was made, did



not exempt the funds in the hands of the wife from her individual debts. We come, then, to a consideration of the amendment of the statute. This, as we have seen, exempts the avails of all life insurance policies payable to the surviving widow from all debts of the beneficiary contracted prior to the death of the assured. To meet the requirements of this statute, it must be shown that the assured is dead, that the widow was the beneficiary, and that the debts were contracted prior to the death of the assured. None of these matters are established in this case. On the contrary, it appears that the assured is still alive, that he and not his wife was the beneficiary, and that the money was actually paid to the assured. It needs no argument to show that the case does not fall either within the language or intent of this amendment. It is said, <sup>555</sup> however, that plaintiff's action is upon a note executed by F. P. Skyles alone, and that the rule we have announced should not obtain. This argument is based upon a misconstruction of the petition. It clearly recites a cause of action against both defendants for services rendered the husband, and the note is but incidentally mentioned. The action is not upon the note.

One other point in the case is conclusive against appellees. It is alleged in the reply that at the time defendant Skyles employed the plaintiff, he (Skyles) agreed to pay plaintiff the amount of his claim out of the avails of the insurance policy. Such an agreement, if made, is legal under the statute, and operates to defeat exemption. Appellee says, in answer to the claim, that, as the agreement was oral, it cannot be proven, for the reason that the contract between the parties was in writing. This alleged contract is an ordinary negotiable note for the sum of two hundred dollars signed by F. P. Skyles, executed some time after the original contract, and made payable to J. C. Brewster. It appears, however, that the payee named was simply a trustee, and that the note was really for the benefit of and belonged to appellant. We have already seen that the action is not upon the note; hence the appellee, in the contention he makes, is relying upon a rule of evidence rather than of pleading. This rule is the familiar one that parol evidence is not admissible to vary, change, or modify the terms of a written contract. The question then arises, Would such evidence violate this rule? We do not think it would. Evidence as to such an agreement would not vary, change, or modify a single word of the note. The two contracts might coexist and neither would infringe upon the other. It is well settled that a contract may rest

partly in writing and partly in parol, and that in such cases extrinsic evidence <sup>556</sup> is admissible to establish that part which is not in writing. It is clear, we think, that the court was in error in refusing to give force and effect to the alleged agreement with reference to the disposition of the avails of the policy.

Another reason why the appellees' contention is not sound is found in the fact that F. P. Skyles pleaded that the note for two hundred dollars was obtained through fraud and duress, and was for that reason void and of no effect.

The district court was in error in sustaining the defendants' motion to dissolve the attachment, and its order and judgment is reversed.

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**EXECUTION—EXEMPTIONS—WAIVER OF—ASSIGNMENT OF LIFE INSURANCE.**—It is generally stated that exemption of property from execution is a personal privilege and may be waived: *Wyman v. Gay*, 90 Me. 136; 60 Am. St. Rep. 238, and note; *Sherrille v. Chaffee*, 17 R. I. 195; 33 Am. St. Rep. 863. But the cases upon this subject are in conflict. We criticised the holding in the case first cited, which was that the transfer of an exempt life insurance policy to a creditor amounted to a waiver of the exemption rendering the policy subject, in the hands of the transferee, to the claims of other creditors. It has been questioned whether a debtor has a right to waive exemptions by contract when he assumes an indebtedness, because the exemption is allowed as much on account of his family as of himself. Such contracts are opposed to public policy: Extended note to *Bowman v. Smiley*, 72 Am. Dec. 741; *Mills v. Bennett*, 94 Tenn. 651; 45 Am. St. Rep. 763, and note; *Seay v. Palmer*, 93 Ala. 381; 30 Am. St. Rep. 57. It is generally held that since a homestead is not liable for the demands of creditors, a conveyance of it cannot be in fraud of them: *Wells v. Anderson*, 97 Iowa, 201; 59 Am. St. Rep. 409, and note. Of course the whole doctrine of annulling fraudulent conveyances rests upon the ground that the creditor has a right to resort to the property transferred, and it is just that if he had no such right while it was in the debtor's possession, he cannot follow it into the hands of transferees: *Blair v. Smith*, 114 Ind. 114; 5 Am. St. Rep. 593. But it is equally patent that in the hands of the transferee it should not be exempt from execution for the transferee's debts, for the mere reason of the exemption accorded it in the grantor's hands. The joint and several liability of husband and wife, for family expenses under the Iowa statute, sustains the holding of the principal case: See extended note to *Hise v. Hartford Life Ins. Co.*, 20 Am. St. Rep. 360-366.

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## GEHLEN v. KNORR.

[101 IOWA, 700.]

### RIPARIAN OWNERS—CONDEMNATION PROCEEDINGS.

Where proceedings were brought by a person who was about to erect a dam against persons owning land adjacent to the river, and resulted in a judgment as to one of such persons that he was not entitled to receive anything, it is fair to presume that such judgment was based upon the theory that the backwater from the dam

would not overflow nor injuriously affect his lands. Therefore, such judgment does not give the plaintiff any right as against such landowner to the water itself, or its use, which is not enjoyed by riparian owners generally.

**THE RIGHTS OF RIPARIAN OWNERS** to the use of the waters of a non-navigable stream for an artificial purpose are equal. Each has a right to the reasonable use of the water having reference to the rights of the other therein.

**RIPARIAN OWNERS, RIGHTS OF.**—The general rule is, that an owner of land through which a stream of water flows has the right to have it flow over his land in the natural channel, undiminished in quantity and unimpaired in quality, except in so far as diminution or contamination is inseparable from a reasonable use of such water.

**RIPARIAN OWNERS, RIGHT OF TO DETAIN WATER.**—A riparian owner may reasonably detain water for a proper purpose, though in so doing he affects the current and retards the flow to some extent.

**RIPARIAN OWNERS, RIGHT OF TO USE PONDS AND OTHER RESERVOIRS.**—A riparian owner may, by the use of a dam or otherwise, retard or divert waters of a stream, so far as necessary to fill a pond or other reservoir and to thereby store water for use as a power for a mill or for any other useful purpose, though the flow of the water to the lands of a lower proprietor is thereby somewhat diminished, because more of the water is lost by evaporation and by soaking into the ground, than when it was left to flow without obstruction in the natural channel.

**RIPARIAN OWNERS—ICE, RIGHT OF TO FILL RESERVOIRS AND RETAIN WATER FOR THE PURPOSE OF TAKING.**—A riparian owner has the right to divert the waters of a stream into a pond or other reservoir and detain them for the purpose of taking ice therefrom, provided he thereby and by the taking of the ice does not unreasonably diminish the flow of the stream. The detention of the water for two or three days while the pond was filling cannot be regarded as unreasonable.

**ICE, RIGHT OF RIPARIAN OWNERS TO.**—A riparian owner has the same right to ice that he has to the water before it was frozen, and may cut and remove it from the stream in any quantity and to any extent for his own use or for storage or sale, if he does not thereby appreciably diminish the head of water at the dam of the lower proprietor.

P. Farrell and Ira T. Martin, for the appellants.

I. S. Struble, for the appellees.

**703 KINNE, C. J.** 1. Plaintiffs claim that by virtue of the condemnation proceedings they have acquired a right, as against the defendants, not only to flow the water back upon their land, but also a right to the use and enjoyment of the water of the stream which they would not otherwise possess, as riparian owners.

In the condemnation proceedings it appears that the defendant, Rubel, the owner of the land, was found not entitled to any compensation for damages. It is fair to presume, in view of this



and other evidence in this case, that such finding was based upon the theory that the backwater from the plaintiff's dam would not overflow Rubel's land, and hence he was not entitled to damages. We <sup>704</sup> think the testimony in the case before us shows that ever since the erection of plaintiff's dam there has been a current in the river below Ruble's land, hence it cannot be said to be affected with backwater from the dam. Such being the case, plaintiffs acquired no right as against the upper landowner, Ruble, to the water itself, or its use, which is not enjoyed by riparian owners generally.

2. We first proceed to state the law applicable to this case. We shall then be better able to apply it to the facts as they are disclosed by this record. Plaintiffs use the waters of the stream for propelling, in part, the machinery of their mill. Defendants propose to use the water from the same stream, in a congealed state, in the form of ice, which is to be gathered for sale. Both uses are what is known in law as artificial, as distinguished from natural uses: *Willis v. Perry*, 92 Iowa, 297. We need only consider, then, what the law is as to the rights of riparian owners to the use of the waters of a non-navigable stream for artificial purposes. Some general propositions may well be stated. The law is that as to such use, and in the absence of superior rights acquired by license, grant, or prescription, the rights of such proprietors in the water of the stream are equal: *Willis v. Perry*, 92 Iowa, 297. It follows, therefore, that the defendants had the right to use the water reasonably, having reference to plaintiffs' rights therein: *Washburn on Easements*, 379. Broadly stated, the general rule is that the owner of the land through which a stream of water runs, has a right to have it flow over his land in the natural channel, undiminished in quantity, and unimpaired in quality, except in so far as diminution or contamination is inseparable from a reasonable use of such water: *Willis v. Perry*, 92 Iowa, 297; *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa, 578; 14 Am. St. Rep. 319; *Spence v. McDonough*, 77 <sup>705</sup> Iowa, 462; 28 Am. & Eng. Ency. of Law, 948; *Elliot v. Fitchburg R. R. Co.*, 10 Cush. 191; 57 Am. Dec. 85, and notes; *Moulton v. Newburyport Water Co.*, 137 Mass. 163; *Garwood v. New York etc. R. R. Co.*, 83 N. Y. 400; 38 Am. Rep. 542; *Brookville etc. Hydraulic Co. v. Butler*, 91 Ind. 138; 46 Am. Rep. 580; *Heilbron v. Fowler etc. Canal Co.*, 75 Cal. 426; 7 Am. St. Rep. 183; *Dumont v. Kellogg*, 29 Mich. 420; 18 Am. Rep. 102; *Union etc. Min. Co. v. Dangberg*, 2 Saw. 450, Fed. Cas. No. 14,370; *Tyler v. Wilkinson*, 4 Mason,

397; Fed. Cas. No. 14,312; Bullard v. Saratoga etc. Mfg. Co., 77 N. Y. 530; Palmer v. Mulligan, 3 Caines, 307; 2 Am. Dec. 270; Davis v. Getchell, 50 Me. 602; 79 Am. Dec. 636, and note; Wadsworth v. Tillotson, 15 Conn. 366; 39 Am. Dec. 391; Haskins v. Haskins, 9 Gray, 390; Snow v. Parsons, 28 Vt. 459; 67 Am. Dec. 723; Springfield v. Harris, 4 Allen, 494; 81 Am. Dec. 715; Red River etc. Mills v. Wright, 30 Minn. 249; 44 Am. Rep. 194. No statement can be made as to what is such reasonable use which will, without variation or qualification, apply to the facts of every case. But in determining whether a use is reasonable we must consider what the use is for; its extent, duration, necessity, and its application; the nature and size of the stream, and the several uses to which it is put; the extent of the injury to the one proprietor, and of the benefit to the other; and all other facts which may bear upon the reasonableness of the use: Red River etc. Mills v. Wright, 30 Minn. 249; 44 Am. Rep. 194, and cases cited; Washburn on Easements, 379. Now, while one riparian proprietor may not divert the water of a stream so as to deprive a lower proprietor on the same stream of the benefit thereof, such upper proprietor may reasonably detain the water for proper purposes: Washburn on Easements, 380; Brookville etc. Hydraulic Co. v. Butler, 91 Ind. 138; 46 Am. Rep. 580; 28 Am. & Eng. Ency. of Law, 955; Gould on Waters, sec. 213; Angel on Watercourses, secs. 90-96; Gillett v. Johnson, 30 Conn. 180. The doctrine that such use by the upper proprietor may result in diminishing the quantity of water which will go down the stream, <sup>706</sup> and may affect the current by retarding the flow to a reasonable extent, and still be consistent with the existence of a common right, was early held in this country, and has been constantly adhered to: Tyler v. Wilkinson, 4 Masson, 397; Dumont v. Kellogg, 29 Mich. 420; 18 Am. Rep. 102; Bullard v. Saratoga etc. Mfg. Co., 77 N. Y. 530; Eidemiller Ice Co. v. Guthrie, 42 Neb. 238; Gould on Waters, sec. 191; Palmer v. Mulligan, 3 Caines, 307; 2 Am. Dec. 270; Davis v. Getchell, 50 Me. 602; 79 Am. Dec. 636; Van Hoesen v. Coventry, 10 Barb. 518; Oregon Iron Co. v. Trullenger, 3 Or. 1; 3 Kent's Commentaries, 439; Kenney etc. Mfg. Co. v. Union Mfg. Co., 39 Conn. 577; Timm v. Bear, 29 Wis. 254; Whaler v. Ahl, 29 Pa. St. 98; Gould v. Boston Duck Co., 13 Gray, 442. If the general rule that each riparian proprietor is entitled to the flow of the stream, according to its natural course, without interruption or diminution, should be strictly adhered to, it would result in a virtual abrogation of the well-settled doctrine that the

rights of all proprietors of the stream are equal, and would "preclude the use of flowing waters in most cases; as, where power is desired, the rule must yield to the necessity of gathering the water into reservoirs. It is lawful to do this where it is done in good faith, for a useful purpose, and with as little interference with the rights of other proprietors as is reasonably practical under the circumstances": Cooley on Torts, 1st ed., 584; Tyler v. Wilkinson, 4 Mason, 397. In Dumont v. Kellogg, 29 Mich. 420, 18 Am. Rep. 102, it was held, in an action by a mill proprietor against one having a mill and dam above him, on the same stream, for damages caused by detention of the water, that it could not be said that such upper proprietor had no right to use the water to the prejudice of such lower proprietor; nor could it be held that such upper proprietor could not lawfully divert any of the water which would otherwise flow down the stream. The court said the real question was "whether, under all the circumstances of the <sup>707</sup> case, the use of the water by one is reasonable, and consistent with a correspondent enjoyment of right by the other." In Bullard v. Saratoga etc. Mfg. Co., 77 N. Y. 530, it is said that the fact that an injury results to other riparian owners from the construction and use of dams is not decisive upon the question as to whether such use is permissible. In that case the upper proprietor had interfered with the flow of water by collecting the water at times in a pond, and while it was so collecting, plaintiff had not sufficient water to use his mill. The court of appeals sustained a finding by the lower court that the detention of the water by the upper proprietor was not unreasonable. In Palmer v. Mulligan, 3 Caines, 307, 2 Am. Dec. 270, the court said: "The erection of dams on all rivers are injurious in some degree to those who have mills on the same stream below him by withholding the water, and by a greater evaporation in consequence of the increased surface; yet such injuries, I believe, were never thought to afford a ground of action." In Merritt v. Brinkerhoff, 17 Johns. 306, 8 Am. Dec. 404, it is said: "The common use of the water of a stream by persons having mills above is frequently, if not generally, attended with damage and loss to the mills below, but that is incidental to the common use, and for the most part unavoidable. If the injury is trivial, the law will not afford redress, because every person who builds a mill does it subject to that contingency. The person owning an upper mill on the same stream had a lawful right to use the water, and may apply it in order to work his mills to the best ad-



vantage, subject, however, to this limitation; that if, in the exercise of this right and in consequence of it, the mills lower down on the stream are rendered useless and unproductive, the law in that case will interpose and limit the common right, so that the owners of the lower mills shall <sup>708</sup> enjoy a fair participation." In *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636, it is held, such riparian owners may, to a reasonable extent, diminish the volume of water, and may detain it a reasonable time, in order to accumulate a head, which can be made available for practical use: *Timm v. Bear*, 29 Wis. 254; *Whaler v. Ahl*, 29 Pa. St. 98. In *Keeney etc. Mfg. Co. v. Union Mfg. Co.*, 39 Conn. 577, it is said: "The right of the proprietor above, to make the water useful to him by detaining it long enough to render it useful, is of the same quality as of the proprietor below, to take the water out of the course of the current for use, when both parties are applying the water to the artificial use of propelling machinery." In *Gould v. Boston Duck Co.*, 13 Gray, 442, it is held, that an upper proprietor may, under proper circumstances, detain the water of a stream so long as may be necessary to raise the requisite head, and accumulate such a quantity as will enable him to use the water in propelling his machinery.

Now, applying the law to the facts of this case, we are required to determine whether the use by the defendants was, under all of the circumstances, a reasonable use. If it was, plaintiffs were not entitled to any relief. Plaintiff's mill was operated in part by steam and in part by water power. It had three water wheels of one hundred, thirty, and twenty-five horse power, respectively. Its capacity is one hundred and fifty barrels of flour and five carloads of feed per day. Ordinarily, about seventy-five per cent of the power was furnished by the engine, and twenty-five per cent by the water. For several years, and since the capacity of the mill was doubled, there has not been water sufficient to operate the mill at anywhere near its full capacity. The stream is now about a foot deep and three feet wide. Plaintiffs' evidence tends to show that after the defendants erected their dam, plaintiffs were compelled <sup>709</sup> to reduce their output of flour about fifteen barrels per day; that before the erection of the defendants' dam, as well as after it had been removed, plaintiffs had two feet of water in their race, and four feet on the wheels; and that while said dam remained, plaintiffs had about three inches of water in their race and two feet on the wheels. Defendants' dam was built for the sole purpose of collecting and

retaining sufficient water in the pond so that ice could be cut and taken therefrom during the winter season. It took about two days and one night to fill the pond, and, when filled, water flowed over it or through the chute. Plaintiffs themselves had for years cut, or permitted to be cut, large quantities of ice from their mill pond, and assert that it had not interfered with the volume of water, or with the operation of their mill. It is not claimed that there was any diversion of the water by the defendants, unless the taking of ice from their pond could be treated as such. The claim is, that the defendants, by erecting their dam, detain the water in a pond, and thereby the water is spread out over a broader surface, and soaks into the ground; also, that more is lost by evaporation than would be if the stream was left to its natural flow. As to the damage by soaking and evaporation, in view of the authorities cited, we do not think the plaintiffs can be heard to complain of it. Both parties had a dam and a pond, and it may fairly be presumed, that the loss by soakage and evaporation is a necessary result of the reasonable use of the stream by any one for artificial purposes, and therefore it would furnish no cause of action to the plaintiffs. We think it is fair to say, from all of the evidence, that, after the defendants' pond had filled, the flow of water therefrom down the stream to the plaintiffs' pond, would not have been materially interfered with. It may be, that the taking of ice from <sup>710</sup> the pond—which, of course, resulted in the removal of that much water, in a congealed state—would slightly decrease the quantity of water which would flow down to plaintiffs' pond, but it is evident, from the evidence, that its effect would not be such as to justify a court in preventing defendants from using the water as they proposed, unless there is a different rule applying to the right to remove ice, from that governing the right to use water, which question we shall consider later. We do not think that a detention of the water for two or three days by defendants, while their pond was filling, can be said to be an unreasonable detention. It is clear that the use of the water of the stream for any artificial use whatsoever by the defendants would require the erection of a dam, and the detention of the water long enough to fill the pond. If they had not the right to do this, they would not be placed upon an equality of right with the plaintiffs as to the use of the water. If the contention of plaintiffs be sustained, the result would be that, in effect, they would be given rights in the water of the river superior to all persons above them, so far as artificial uses are

concerned; and upper riparian owners would be deprived of all right to use the water for artificial purposes. Such a holding would not be in accord with the rules of law applicable to such cases, and would be most inequitable and unjust. These parties are, by the law, placed upon an equality as to their right to use the water of this stream, and neither may exercise his right as to unduly interfere with the rights of the other; still both must put up with such slight disadvantages as are indispensable to a reasonable use by the other.

3. The rights of the parties to the use of the water of the stream are in nowise affected by the fact that it was proposed to remove the water in its congealed state. In *Brown v. Cunningham*, 82 Iowa, 711 512, it is held that the same rights to ice exist which may be held to the water, "for ice is water in another form—congealed water." In *Marsh v. McNider*, 88 Iowa, 395, 45 Am. St. Rep. 240, it is held that ice in a running stream is, in most respects, subject to the rules which govern the rights of the riparian proprietor, to the water. That the defendant's right to the ice is the same as in the water before it is congealed is well settled: *Elliot v. Fitchburg R. R. Co.*, 10 Cush. 191; 57 Am. Dec. 85; *Stevens v. Kelley*, 78 Me. 445; 57 Am. Rep. 813; *Cummings v. Barrett*, 10 Cush. 186; *Brookville etc. Hydraulic Co. v. Butler*, 91 Ind. 138; 46 Am. Rep. 580; *State v. Pottmeyer*, 33 Ind. 402; 5 Am. Rep. 224; *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238; *Bigelow v. Shaw*, 65 Mich. 341; 8 Am. St. Rep. 902. The rule is stated in several of the cases above cited, that the owner of the soil under a non-navigable watercourse, has the right to cut and remove the ice from the stream adjoining his land in any quantity, and to any extent, for his own use, or for storage or sale, if he does not thereby appreciably diminish the head of water at the dam of the lower proprietor: *Paine v. Woods*, 108 Mass. 172; *Searle v. Gardner* (Pa. Sup., April 23, 1888), 13 Atl. Rep. 835; *Howe v. Andrews*, 62 Conn. 398; *Gould on Waters*, sec. 191.

We have not discussed the evidence in detail in this case; indeed, we have not referred to all of it, but we have fully considered it in arriving at our conclusions. There is evidence tending to show that the backwater from plaintiffs' pond flowed over some of the land where defendants' dam and pond were situated, but we are impressed with the conviction that the weight of the evidence, in view of all of the facts, is to the contrary. We are of the opinion that defendants had a right to build the dam, and to reasonably detain the water until their



pond was filled, and to remove and sell the ice which <sup>712</sup> might be formed thereon, and that whatever damage plaintiffs sustained by reason thereof was necessarily incident to such reasonable use, and hence furnished no cause of action to the plaintiffs. In view of the disposition made of the case, we need not pass upon appellee's motion. For the reasons given, the decree of the district court is reversed.

Ladd, J., takes no part.

**WATERS AND WATERCOURSES—RIPARIAN RIGHTS—LIMITATIONS UPON.**—The right of a riparian owner to the use of the water as it is accustomed to flow, without diminution or alteration, is subject to the well-recognized limitation that each owner may make a reasonable use of the water for domestic, agricultural, and manufacturing purposes: *Benton v. Johncox*, 17 Wash. 277; 61 Am. St. Rep. 912, and note. Whether a given use is reasonable or not must depend upon the character and size of the stream, the uses to which it is subservient, and the other circumstances of each particular case: *White v. East Lake Land Co.*, 96 Ga. 415; 51 Am. St. Rep. 141, and note. Thus, an upper and prior owner of a dam in a natural stream cannot be enjoined by a lower dam-owner from penning back the water and raising a sufficient pond to supply power for his mill, although such use at times holds back the water so as to deprive the lower owner of a sufficient supply thereof: *Mumpower v. Bristol*, 90 Va. 151; 44 Am. St. Rep. 902, and note; while where the accumulation was merely an artificial lake or pond, and the water was diminished by percolation or evaporation to such an extent as to deprive the lower owner of his reasonable rights thereto, the use was held unreasonable, rendering the upper proprietor liable in damages: *White v. East Lake Land Co.*, 96 Ga. 415; 51 Am. St. Rep. 141, and note. See, also, *Tampa Water Works Co. v. Cline*, 37 Fla. 586; 53 Am. St. Rep. 262, and note.

**WATERS AND WATERCOURSES—RIGHT TO CUT ICE.**—Ice belongs to the owner of the soil under the water on which it forms: *Bigelow v. Shaw*, 65 Mich. 341; 8 Am. St. Rep. 902, and note. A riparian owner on a navigable stream has no superior right to the ice formed in it opposite his land, but it belongs to the first appropriator: *Wood v. Fowler*, 26 Kan. 682; 40 Am. Rep. 330. Compare *Washington Ice Co. v. Shortall*, 101 Ill. 308; 40 Am. Rep. 196. See extended note to *Higgins v. Kusterer*, 32 Am. Rep. 164-168.

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## ANDERSON v. MOLINE PLOW COMPANY.

[101 Iowa, 747.]

**ATTACHMENTS, INSUFFICIENCY OF SHERIFF'S RETURN.**—It is not sufficient for a sheriff to state in his return that he has attached certain property, describing it. He must show the doing of the acts necessary to be done by him in making a complete and valid levy of the writ.

L. D. Hobson and George W. Hewitt, for the appellants.

G. W. Pitts, for the appellees.

**748** GRANGER, J. 1. The real estate in question is the northeast one-quarter of section 13, township 94, range 47, in Sioux county, Iowa. Prior to March 6, 1885, it belonged to John McCornack. On that day he conveyed it by warranty deed to plaintiff Anderson. Since that time Anderson has conveyed it to George W. Karr, and he to William E. Shimer. Karr and Shimer have been made parties to the suit since its commencement by an answer and cross-bill filed by the defendants. There is no dispute as to title of plaintiff or his grantees, unless the defendants have a lien on the land by virtue of an attachment levy made on the same day of the said transfer to Anderson. A question in the case is as to the validity of the levy of the attachment so as to constitute a lien. If there is no such levy, then defendants have no rights in the land, and it is, as we understand, the property of Shimer. The pleadings are quite voluminous, and the facts are numerous as bearing upon other questions considered in the case, but for the purpose of determining the validity of the levy some of the issues and most of the facts may be disregarded. McCornack was a resident of the state of Illinois, as was the plaintiff Anderson, when the conveyance was made to Anderson. The attachments claimed to have been levied on the land issued out of the office of the clerk of the district court of Sioux county, in this state, in two suits commenced therein by the Moline Plow Company and George Enger and Company against Foster Brothers and John McCornack, that being the firm name, and also against the members of the firm as individuals. Personal service was obtained, except as to John McCornack, who at the commencement of the suits and the issuing of the attachments, was in Illinois, and died there some **749** fourteen days after. The sheriff indorsed a return on the attachment, in which it is stated that he "levied upon and attached" the real estate in question. And in the encumbrance book in the office of the clerk, is an entry reciting a levy of the writ on the land. And in a book entitled "An Index of All Liens," is an entry that the attachments are liens on the land. This action is to remove the clouds upon the title caused by these record entries.

2. The defect urged as to the levy of the attachment is that there was no notice of the attachment given to the person occupying or in possession of the land. There is a dispute of fact as to there being such occupancy or possession, but we have no doubt on that question. It clearly appears that there was, and the person was one Jacobs. The return states the conclusion,

as we have indicated above, that he (the sheriff) had "levied upon and attached" the land. There is no statement in the return that he gave Jacobs, or any other person, notice of the attachment; and it is because of this that the levy is thought to be defective. Appellants contend that the statement of the conclusion as to the levy and attachment is a sufficient statement, and includes the particulars necessary to constitute the levy. By section 3010 of the code it is provided that "the sheriff shall return upon every attachment what he has done under it." It further provides: "The return must show the property attached, the time it was attached, and the disposition made of it, by full and particular inventory." The section states other particulars to be observed. The quotations we have made appear consecutively in the section, and it is reasonable to say the requirements are as to different duties. Section 2967 of the code provides how attachments shall be levied, as follows: "By giving the defendant in the action, if found within the county, and also the person <sup>750</sup> occupying or in possession of the property, if it be in the hands of a third person, notice of attachment." It has been held that this requirement applies to real estate: *First Nat. Bank v. Jasper County Bank*, 71 Iowa, 486. Upon the question as to whether the return should show the fact of notice we refer to *Sioux Valley State Bank v. Kellogg*, 81 Iowa, 124. In that case the sufficiency of such a levy was considered, and, in holding the levy insufficient, it is said to be so "for the reason that the record shows that there was no levy of the attachment. It is not shown in the record that notice of the levy of the attachment was given to the defendant. The return of the officer serving the attachment fails to show such notice." It thus appears that there was a return showing a service, but it failed to show the particular facts essential to a levy. It is also said in the opinion: "This court has held that under section 2967 of the code such a defect is fatal, and a levy is invalid in the absence of the notice required by this section." It refers to *First Nat. Bank v. Jasper County Bank*, 71 Iowa, 486. It is further said in that case, that the levy is insufficient even though the supposed levy is entered in the encumbrance book. We see no way of escape from the conclusion that the levy is insufficient; nor, as a general proposition, do we think it desirable to escape it. It is certainly a safer rule to require the officer, in making his return, to show the facts constituting his levy, and leave the conclusion as to its sufficiency to the court, than to permit the officer to state the conclu-



sion. Such acts many times involve vast interests, and the conclusion may, with greater safety to parties, be left to the court, when fully advised as to the law and facts, than to the officer executing the writ.

3. There is an earnest contention by appellants that the case involves no issue as to the <sup>251</sup> sufficiency of the levy. It is doubtless true that the original petition did not present that fact as one on which relief was asked, and there appears in the petition a statement of a levy of the attachments. Later, the defendants, by cross-petition, asking affirmative relief because of their attachment liens, brought in the grantees of Anderson, Karr, and Shimer, and numerous pleadings were filed, and, among them, an amendment to the original petition, by which parts of it were supplemented by the amendment; so that there no longer remained an averment of a levy, but only of a pretended levy, and a denial that any interest was acquired by it. It also appears that Karr and Shimer filed their answer to the cross-petition by which they were made parties, and they expressly deny the levy of the attachments, so that the issue as to them is, in terms presented, and they ask that their rights be fully protected. The interests of Anderson, Karr, and Shimer are so identical that, if the latter succeeds, the former must. If the attachment is not sustained, it ends the case as to appellants on all the issues. We think the issue is presented as to all the appellees, and the judgment must stand.

Affirmed.

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ATTACHMENT—SUFFICIENCY OF RETURN.—Where the service of an attachment in the case of real property is required to be made by leaving a copy of the writ with the occupant thereof, or if there is no occupant, by leaving a copy in a conspicuous place thereon, a sheriff's return upon the writ which fails to show that the defendant to whom a certified copy was delivered was an occupant of the land sought to be attached, or that there was no occupant of such land, or that a certified copy of the writ posted on the front of defendant's dwelling-house was posted in a conspicuous place on such premises, is insufficient: *Hall v. Stevenson*, 19 Or. 153; 20 Am. St. Rep. 803, and note.

## WINTERS v. WINTERS.

[102 IOWA, 53.]

**APPEAL—SHORTHAND NOTES—DEPOSITION AS PART OF RECORD.**—If the evidence, at the hearing of a deposition, is taken in shorthand, by the official stenographer, and, after its introduction, is immediately certified as required by law, and filed, it thereby becomes a part of the record without any order to that effect.

**APPEAL—SHORTHAND NOTES—SKELETON BILL OF EXCEPTIONS—SUFFICIENT REFERENCE TO EVIDENCE.**—If a skeleton bill of exceptions directs the clerk to insert a deposition or oral testimony, "as shown by the minutes of the shorthand reporter," taken upon the hearing of the deposition, the evidence is referred to with sufficient certainty, and the notes of the reporter, certified as required by law and filed, sufficiently identify the deposition.

**TRIAL—OBJECTION TO INCOMPETENT WITNESS.**—If a witness is made, by statute, incompetent to testify at all, objection must be made when he is sworn.

**TRIAL—DEPOSITION.—AN OBJECTION TO THE COMPETENCY OF EVIDENCE,** taken on the hearing of a deposition, may be made for the first time at the trial.

**TRIAL—DEPOSITION—OBJECTION TO COMPETENCY OF EVIDENCE—PRIVILEGED COMMUNICATIONS.**—Under a statute providing that no exceptions to depositions other than for incompetency or irrelevancy can be regarded unless made by motion before the case is reached for trial, an exception to the deposition of a physician, on the ground that it reveals confidential communications, may be made for the first time at the trial, because the objection goes to the competency of the evidence, and not to the witness.

**WITNESSES—PHYSICIAN—ADMISSIBILITY OF PRIVILEGED COMMUNICATION ON PROBATE AND CONTEST OF WILL.**—In a contest over the proof of a will, where there is a dispute, as to the testamentary capacity of the testator, between the devisee or legal representative, and the heirs at law, all claiming under the deceased, the attending physician may be called as a witness, by either party, and examined as to information acquired in his professional capacity, although the statute prohibits the disclosure of such information unless the party for whose benefit the prohibition is made waives his right thereunder. The privilege cannot be urged, in such a case, because the proceedings are not adverse to the estate, and the interest of the deceased as well as of the estate is, that the truth be ascertained; but the court may, in its discretion, and where necessary, prevent the memory of the dead from being blackened by such testimony.

Contest over the proof of a paper purporting to be the last will of M. F. Winters, deceased, who left, surviving him, his widow, Catherine Winters, and his brother and only heir, John C. Winters. The paper left to the widow all of the decedent's property and named her as executrix, without bond. John C. Winters filed objections thereto, alleging a want of testamentary capacity, and the exercise of undue influence. The will was established and the contestant appealed.

Babb & Withrow and Blake & Blake, for the appellant.

McCoid & Finley and T. M. McAdam, for the appellee.

<sup>54</sup> LADD, J. The will in controversy bears date January 2, 1895, nineteen days prior to the death of Winters. For some weeks previous to December 24th, preceding his death, he had been at Hot Springs, Arkansas, and while there was treated for his ailments by A. F. Sanders, a practicing physician of that place. The contestant took the deposition of this doctor, and when he offered to read it in evidence, the proponent objected to the interrogatories as incompetent. This <sup>55</sup> objection was sustained by the court, and the testimony of the witness excluded. No objection was made at the time of the taking of the deposition, and no written motion or exception with reference thereto filed. The only questions argued relate to the exclusion of this evidence.

1. The appellee moves to strike from the abstract that part containing the deposition of Sanders, on the ground that the same is not identified in the skeleton bill of exceptions. Such bill directs the clerk to insert the depositions or oral testimony "as shown by the minutes of the shorthand reporter taken upon said hearing." This refers to the evidence with sufficient certainty: *Yount v. Carney*, 91 Iowa, 559. The evidence was taken down in shorthand by the official stenographer, and, after its introduction, was immediately certified as required by law, filed, and thereby became a part of the record. No order therefor was necessary: *Bunyan v. Loftus*, 90 Iowa, 124. The notes of the reporter clearly identify this deposition. The errors on the admission or the exclusion of evidence were, therefore, properly preserved: *Fleming v. Stearns*, 79 Iowa, 258; *Hood v. Chicago etc. Ry. Co.*, 95 Iowa, 331. Only two assignments of error are argued, and appellee urges that these are not specifically stated. They are stated, however, with as much particularity as the circumstances of the case will permit.

2. To the interrogatories in the deposition of Sanders, concerning the condition of the deceased, and his opinion of his mental condition, derived while acting as his physician, the objection of incompetency was urged and sustained. It is insisted that this ruling was erroneous, because made for the first time at the trial. No exceptions to depositions other than for incompetency or irrelevancy <sup>56</sup> can be regarded unless made by motion before the case is reached for trial: Code, sec. 3751. The objection of incompetency, without more, goes to the evidence, and



not to the witness: *White v. Smith*, 54 Iowa, 233; *Ball v. Keokuk etc. Ry. Co.*, 74 Iowa, 132. Where the witness is made by the statute incompetent to testify at all, objection must be made when he is sworn: *Watson v. Riskamire*, 45 Iowa, 231. In *Burton v. Baldwin*, 61 Iowa, 283, it is held that objection to the testimony of a witness to personal transactions, or communications, prohibited by section 3639 of the code, is timely if made during the trial. This section is so similar to section 3643 of the code that the ruling must control in this case. It seems to be there held that if the witness is only prohibited from testifying with respect to some particular matter, but is otherwise competent, then the objection on the ground of incompetency may be urged at the time the deposition is offered in evidence. While the opinion in *Burton v. Baldwin*, 61 Iowa, 283, does not refer to the ruling in *Greedy v. McGee*, 55 Iowa, 759, the latter must be regarded as overruled. It follows that the objection was made in apt time.

3. The important question in this case is, whether the deposition of Dr. Sanders may be received in evidence, when offered by the contestant. Section 3643 of the code is as follows: "No practicing attorney, counselor, physician, surgeon, minister of the gospel, or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice and discipline. Such prohibitions shall not apply to cases where the party in whose favor the same are made waives the <sup>57</sup> right conferred." On the authority of *Denning v. Butcher*, 91 Iowa, 425, this evidence, if offered by the proponent, should have been received, though no executor had been appointed. Ought it to be rejected when offered by an heir at law? At common law, confidential communications to a physician were not privileged, and they are only so made by statute. Those to an attorney, however, were privileged, and it was held that the attorney might not divulge without the consent of the client while living, but that, after his death, in a contest between a stranger and an heir, devisee, or personal representative, the latter might waive the privilege and examine the attorney concerning the confidential communications, though the stranger was not permitted to do so; and, in a controversy between heirs at law, devisees, and personal representatives, the claim that the communication was privileged could not be urged, because, in such a case, the pro-

ceedings were not adverse to the estate, and the interest of the deceased, as well as of the estate, was, that the truth be ascertained: Hageman on Privileged Communications, sec. 84; Russell v. Jackson, 9 Hare, 387; In re Layman's Will, 40 Minn. 371; Scott v. Harris, 113 Ill. 451; Doherty v. O'Callaghan, 157 Mass. 90; 34 Am. St. Rep. 258; Blackburn v. Crawfords, 3 Wall. 175.

Does the statute change the common-law rule with reference to attorneys, or only extend it so as to include other professions? The authorities bearing on this question are conflicting, though not numerous. Under a statute requiring the privilege to be "expressly waived by the patient," the court of appeals of New York held that the seal of secrecy remains forever unless removed by the patient himself: Westover v. Aetna Life Ins. Co., 99 N. Y. 56; 52 Am. Rep. 1; Renihan v. Dennin, 103 N. Y. 573; 57 Am. Rep. 770. This ruling <sup>58</sup> was contrary to the practice followed in that state for many years (Allen v. Public Administrator, 1 Bradf. 221), and the legislature amended the statute in 1893, allowing the privilege to be waived by executor, surviving husband, widow, heir at law, or next of kin in a proceeding to probate the will of the patient. The supreme court of Indiana seems to have followed the cases cited in excluding the evidence when offered by the heir at law: Heuston v. Simpson, 115 Ind. 62; 7 Am. St. Rep. 409. It is held otherwise in Morris v. Morris, 119 Ind. 341, where the court permitted the administrator with the will annexed to call the attending physician as a witness, saying "he was the representative of the testator, and was seeking to maintain his will, and had the right, we think, as such representative, to call the attending physician who attended the testator in his last illness to prove the condition of his mind at the time the will was executed." In In re Flint's Estate, 100 Cal. 391, it is held that the privilege cannot be waived by an heir at law in a contest with the devisee. These decisions are based on the ground that the executor or devisee represents the deceased, and the evidence is offered to sustain the will, which it is the policy of the law to maintain. The particular vice in the reasoning in these cases, in making the distinction between the heir at law and the devisee, is the assumption that the paper in dispute is the will of the deceased. The statutes are for the benefit of the patient while living and of his estate when dead. The very purpose of the contest is to determine whether the deceased in fact made a will, who shall be his representative, and who is entitled to his estate. If he did not have testamentary capacity, then the paper was not his will, and it is

not the policy of the law to maintain such an instrument. It is undoubtedly the policy of the law to uphold the <sup>59</sup> testamentary disposition of property, but not until it is ascertained whether such a disposition has been made. The same presumptions are indulged in favor of the validity of the will as of other written instruments. The paramount purpose in the first instance should be to ascertain whether the instrument presented is in fact the will of the deceased. And no one can be said to represent the deceased in that contest, for he could only be interested in having the truth ascertained, and his estate can only be protected by establishing or defeating the instrument as the truth so ascertained may require. The testimony of the attending physician is usually reliable, and often controlling, and to place it at the disposal of one party to such a proceeding and withhold it from the other would be manifestly partial and unjust. Such testimony, ordinarily, relates to the capacity of the deceased, and could rarely be perverted to the injury of character. Should it ever be necessary, the court might well, in its discretion, prevent blackening the memory of the dead. The language of the statute quoted indicates no intention on the part of the legislature to change the common-law rule with reference to confidential communications to attorneys, and it is difficult to understand why the rule of exclusion should apply in the case of a physician and not of an attorney. The statute places both on the same ground. As said in *Denning v. Butcher*, 91 Iowa, 425: "The settled practice in this state has been to receive the testimony of the attending physician touching the testator's physical and mental condition at and prior to the time of the execution of the will; and unless the reasons are obvious and urgent, and a proper construction of the statute requires it, no rule should be established which will set aside a practice long recognized as proper and necessary."

<sup>60</sup> It is not very material to the result whether we say the heir or devisee may, in the interest of the estate of the deceased, waive the privilege, or that the statute does not apply to a case where the proceedings are not adverse to the estate, and the interest of the deceased as well as his estate could only be the determination of the truth. In either event, we hold that in a dispute between the devisee or legal representative and the heirs at law, all claiming under the deceased, the attending physician may be called as a witness by either party: *Thompson v. Ish*, 99 Mo. 160; 17 Am. St. Rep. 552.

Reversed.



**EVIDENCE—WITNESSES—COMPETENCY—OBJECTIONS.**—Objections to evidence must be made, if at all, when it is offered. They cannot be raised for the first time in the appellate court: *Parke v. Foster*, 26 Ga. 465; 71 Am. Dec. 221, and note. An objection to evidence as incompetent is waived unless made when the evidence is offered: *Wait v. Maxwell*, 5 Pick. 217; 16 Am. Dec. 391. An objection to the competency of a witness must be made, if his incompetency is known, before he is examined in chief; at least, it cannot be made after cross-examination: *Pillow v. Southwestern etc. Imp. Co.*, 92 Va. 144; 53 Am. St. Rep. 804.

**WITNESSES—PHYSICIANS—PROBATE OF WILL—PRIVILEGE OF COMMUNICATIONS BETWEEN PHYSICIANS AND PATIENTS—WAIVER.**—A patient may waive the protection afforded by statute against calling his physician to give evidence of information acquired in a professional character; and what he may do in his lifetime those who represent him after his death may also do, for the purpose of protecting interests claimed under him. When, therefore, the dispute is between the devisee and heirs at law of a testator, all claiming under the deceased, either the devisee or heirs may call the testator's attending physician as a witness: *Thompson v. Ish*, 99 Mo. 160; 17 Am. St. Rep. 552, and monographic note thereto on when a physician may, and may not, testify, and in which contrary views are asserted. See, also, *Welch v. Adams*, 63 N. H. 344, 56 Am. Rep. 521, holding that a statute prohibiting a party from testifying where the adverse party is an executor, applies to proceedings for the probate of a will. If the real question in the case is whether there is a will or not, all the parties have a right to testify upon that question: Note to *Welch v. Adams*, 56 Am. Rep. 528.

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## STATE v. EIFERT.

[102 IOWA, 188.]

**FRAUDULENT BANKING.—AN INDICTMENT** for fraudulent banking sufficiently states who was injured or defrauded, and who was the owner of the deposit, where it charges that the banker, knowing himself to be insolvent, accepted a deposit from a person named.

**WITNESSES.—A CROSS-EXAMINATION** must be confined to the matters about which the direct testimony was given.

**WITNESSES — CROSS-EXAMINATION — FRAUDULENT BANKING.**—If a banker, upon an indictment for fraudulent banking, in accepting a deposit, knowing himself to be insolvent, attempts to show his want of connection with the transaction charged by testifying that early on the morning of the day when the deposit was made, he left the town where his bank was located, and went to a city named; that, prior to going, he had a conversation with his son about receiving deposits on that day; that he told him he was going to the place named to look the ground over; that, if things did not look favorable, he would send the son a telephone message, not to receive any more deposits, and to stop doing business; and that he did send him such a message—the cross-examination need not be confined to what the defendant did at the city named, but may be extended to any matter which tends to contradict his testimony in chief, or which more fully discloses his connection with the deposit.

**WITNESSES—CROSS-EXAMINATION—WAIVER OF ERROR.**—If a defendant is required, on cross-examination, and against his objection, to testify to certain facts, any error connected with such cross-examination, even if it is improper, is waived by the defendant where he, in the further progress of the trial, testifies to the same facts without objection.

**FRAUDULENT BANKING—BANKER IS GUILTY OF, WHEN.**—If a banker, knowing his bank to be insolvent, leaves it for a distant city and telephones his son, left in charge of the bank, not to receive any more deposits, but to close the bank, and the son, after receiving such message, ignores it, and accepts a deposit before closing, and the father, upon his return, is made acquainted with what has been done, and fails to repudiate the transaction, but, on the contrary, retains the money and includes it, some days later, in a general assignment for the benefit of his creditors, the banker is guilty of the offense of receiving and accepting a deposit knowing himself to be insolvent.

**FRAUDULENT BANKING—EVIDENCE OF RECEIVING DEPOSIT.**—Upon the trial of a banker for fraudulent banking, in receiving a deposit knowing himself to be insolvent, the fact that the defendant received and accepted the deposit is proved by showing that it was received by the cashier or agent of the defendant, under his authority, without showing that it was received by him personally, or that he was present when it was received.

**FRAUDULENT BANKING—EVIDENCE OF RECEIVING DEPOSIT—UNAUTHORIZED ACT—INSTRUCTION.**—Upon the trial of a banker for fraudulent banking, in receiving a deposit knowing the bank to be insolvent, it is proper to instruct the jury that the defendant "knowingly accepted and received" the deposit, though it was received against his express orders, when he, after knowledge of its being made, accepted it as a deposit, and treated it as a part of the assets of the bank; as such instruction places the acceptance of the deposit on the defendant's own act, and not on the ratification of the act of his cashier, who disregarded his orders.

**FRAUDULENT BANKING—DEFENSE.**—It is no defense to an indictment for fraudulent banking, in receiving a deposit knowing the bank to be insolvent, that the depositor might pursue the deposit as a trust fund.

**INSTRUCTIONS — CORRECT STATEMENT OF LAW STANDING ALONE—EVIDENCE.**—If part of an instruction is a correct statement of the law, it is not erroneous, though there is no evidence to which it, standing alone, can apply, if it aids to make plain that which follows in the instruction.

Indictment for fraudulent banking, resulting in a conviction and sentence to the penitentiary. The defendant appealed.

Gibson & Dawson, for the appellant.

Milton Remley, attorney general, and Jesse A. Miller, for the appellee.

192 KINNE, J. 1. The indictment charges the defendant with the crime of fraudulent banking, committed as follows: "The said Henry Eifert, on the fifteenth day of August, in the year of our Lord 1893, in the county aforesaid, being then and

there engaged in the banking and deposit business, under the name and style of Bank of Tripoli, and then and there being insolvent, and well knowing himself to be insolvent, did knowingly accept and <sup>193</sup> receive from C. H. Mohling a deposit in his banking and deposit business, the sum of one hundred dollars, consisting of gold and silver money, national bank bills, United States treasury notes and currency, and other notes, bills, and drafts circulating as money and currency, the particular description being to the grand jury unknown, to the amount and of the value of one hundred dollars, contrary to the form of the statute in such cases made and provided." The sufficiency of this indictment was questioned by a demurrer, which was overruled, and an exception taken. It is urged that it is defective, in that it does not state whom the money alleged to have been deposited belonged to, or who was the owner of it, or entitled to its possession; that it fails to aver who, if any one, was defrauded. Section 1 of the act against fraudulent banking prohibits any bank, banking-house, or party engaged in banking or deposit business from accepting or receiving on deposit any money when such banking-house or deposit office, firm, or party is insolvent: Acts Eighteenth General Assembly, c. 153, sec. 1. Section 2 is as follows: "If any such bank, banking-house, exchange broker, or deposit office, firm, company, corporation or party, shall receive or accept on deposit any such deposits as aforesaid, when insolvent, any officer, director, cashier, manager, member, party, or managing party thereof, knowing of such insolvency, who shall knowingly receive or accept, be accessory to, or permit or connive at the receiving or accepting on deposit therein, or thereby, any such deposits as aforesaid, shall be guilty of a felony, and, upon conviction, shall be punished by imprisonment in the state prison for a term not to exceed ten years, or by imprisonment in the county jail not to exceed one year, or both fine and imprisonment, the fine not to exceed ten thousand dollars": Acts Eighteenth <sup>194</sup> General Assembly, c. 153, sec. 2. In support of the contention that the indictment is defective because it fails to state the name of the injured party, counsel rely upon cases decided by this court wherein it was held that the indictment, in certain cases, must set out the name of the person injured, or attempted to be injured. We do not think it is necessary to discuss these cases. Let it be conceded that the indictment in this case must show who the injured party is, and we think it must be held to conform to the law in that respect. It occurs to us that one reading this indictment would at once



understand that the charge was that the money belonged to the person making the deposit; that he was the owner. If the act complained of is stated with such a degree of certainty, in ordinary and concise language, and in such a manner, as to enable a person of common understanding to know what is intended to be charged, it is sufficient: Code, sec. 4305. Can there be any doubt that such a person, on reading this indictment, would understand that it charged that the defendant, knowing that he was insolvent, did knowingly receive a deposit of money from Mohling, and that it was his money which was thus deposited? We think not. Now, one may own money, and may send it by some one to be deposited in a bank, but we should not speak of the mere carrier of the money as a depositor, but the one for whom it was in fact taken to the bank would be the depositor. The owners of money deposited in a bank are the depositors of that bank; that is, they are the people who made the deposits. We think that, read in the light of the requirements of our statute, the indictment, to the common understanding, as fairly charges that Mohling was the injured party as if it had in express terms stated that he owned the money which he deposited.

<sup>195</sup> 2. It is strenuously urged that the court erred in permitting certain questions to be asked the defendant on cross-examination. It appeared from the direct examination that the defendant undertook to state his connection, or rather want of connection, with the making of the alleged deposit. He testified that he left town that morning early, and went to Waverly; that, prior to going, he had a conversation with his son about receiving deposits on that day; that he told him he was going to Waverly to look the ground over; and that, if things did not look favorable, he would send the son a telephone message, through a party who was with him, not to receive any more deposits, and to stop doing business; that he sent the message to his son to stop doing business, and not to receive any more deposits. On cross-examination, over the defendant's objection, he was required to testify when he returned from Waverly to Tripoli, and how long he remained in Tripoli, and as to whether he found any deposits had been made after 2 o'clock that day. The law, undoubtedly, is that the cross-examination must be confined to the matters about which the direct testimony is given. It is contended that on cross-examination the state was limited to what the defendant did at Waverly. We do not think so. The defendant was put upon the stand to show that Mohling's de-

posit was received without his knowledge and against his instructions; and to show such facts, he testified as we have stated. The defendant having undertaken to explain his connection, or want of connection, with this deposit, and to show that it was received without his knowledge and against his will, any line of cross-examination which tended to contradict his testimony in chief, or which more fully disclosed his connection with this deposit, was proper. There was no error in <sup>196</sup> the rulings in this respect. Even if the cross-examination was improper, the defendant waived any error connected therewith, because, in the further progress of the trial, he testified to the same facts without objection: *State v. Wickliff*, 95 Iowa, 386; *Strong v. Iowa Cent. Ry. Co.*, 94 Iowa, 380; *Bailey v. Bailey*, 94 Iowa, 598.

3. The eighth paragraph of the court's charge reads: "In determining whether the defendant received or accepted the alleged deposit of C. H. Mohling, you are instructed that it is not necessary that the evidence should show, or that you should find, that the defendant in person received such deposit, nor that he was personally present when it was received from said Mohling, if received at all; it is enough if it was received by the cashier or agent of defendant under his authority. But you are further instructed that even though the defendant instructed Theodore Eifert to close the bank, and refuse to receive or accept further deposits, and that, after such instructions to so refuse deposits, the said Theodore Eifert did accept and receive from said Mohling the deposit in question, if so you find from the evidence, still, if the defendant, with knowledge thereof, accepted and retained as a deposit the amount so received from said Mohling by said Theodore Eifert, and placed among and treated it as a part of the funds or assets of the bank, having full knowledge from what source and under what circumstances and by whom it was received, he will be deemed to have knowingly accepted such sum as a deposit. If, however, such deposit was so received without his authority, and was not accepted by him, if at all, with full knowledge of the manner and circumstances of its being deposited, if at all, then he will not be deemed to have knowingly received or accepted such deposit." <sup>197</sup> Exception is taken to so much of this instruction as relates to the action of the defendant in knowingly accepting and retaining the deposit, after full knowledge from whom and under what circumstances it had been made. The argument of defendant is that when the deposit was received and accepted by defendant's son, and entered upon the books of the bank and upon the depositor's book, the whole transaction was concluded. Now, the facts appear to be

that the son had for a long time been in the bank, assisting his father; that the father was in the city of Waverly when the son, who had charge of the bank, received this deposit; that it was received on the afternoon of August 15, 1893, and several hours after the son had received a telephone message from his father to close the bank and to take no more deposits; that the father returned to Tripoli the same evening, and then learned that this deposit had been received, contrary to his orders; that said money was put into the assets of the bank; and that defendant never paid or tendered it back to Mohling. Now, when did defendant "knowingly accept and receive" this money, as charged in the indictment? We think he must be said to have done so when he returned home, and first knew of the fact of its receipt. If he had given no directions to stop business and refuse further deposits, then it might be said that he should be concluded by the transaction when the money was in fact received by his son, who had authority to act for him. But, having expressly directed the son to cease business and refuse deposits, he had no reason to suspect or believe that his orders would not be obeyed. It cannot, therefore, be said that he knowingly received and accepted the deposit when it was handed to his son, and by him accepted, without the father's knowledge, and against his express directions. When, however, he arrived home that <sup>198</sup> evening, he became acquainted with all the facts; he then knew that this deposit had been accepted by the son after he had directed him to take no more deposits; he knew who made the deposit; he knew he was then insolvent, and that he had been before the son had received the deposit; and, knowing all the facts, he did not repudiate the transaction, but retained and accepted the money, at the same time knowing that his bank would never open again. It seems to us that when defendant, after full knowledge of all the facts, on the evening after his return, failed to repudiate the act of his son, and took no steps looking to a return of the deposit to Mohling, he then knowingly received and accepted the deposit. It must be borne in mind that this is not a civil action for damages for the recovery of the money deposited. It may be that in such a case recovery could be had of the defendant, notwithstanding the deposit was received by his agent contrary to his directions. But the gist of the offense charged in the prosecution is in knowingly receiving and accepting a deposit; knowing that he was then insolvent. Surely one whose agent, without his knowledge or authority, and in disobedience of his ex-



press instructions, receives and accepts for his principal, money as a deposit, will not by such act be rendered liable criminally for knowingly receiving and accepting the money, but it cannot be doubted that, after coming into possession of all of the facts, the principal may so ratify the act theretofore done as to make it binding upon himself, and the basis of a criminal liability. If the defendant had, on being acquainted with what had been done, promptly disavowed the act of his son, and returned the deposit to Mohling, he would not have been guilty, as it could not then have been said that he had knowingly received and accepted the deposit. It seems to us the <sup>199</sup> instruction is correct, and quite as favorable to the defendant as he had a right to expect.

4. Finally, it is said that the verdict is contrary to the evidence. This conclusion is reached by counsel on the theory that the acts considered in the third division of this opinion, and held by us to justify the instruction complained of, do not, if established, show a violation of the statute. We think the evidence fully sustains the verdict. Indeed, it is difficult to understand, under our view of the law, how the jury could have reached a different conclusion.

Discovering no error in the entire record, the judgment below is affirmed.

#### SUPPLEMENTAL OPINION ON REHEARING.

GIVEN, J. A rehearing was granted in this case that we might, with the aid of further arguments, reconsider the objections urged by appellant to the eighth paragraph of the charge to the jury, or, in other words, that we might review the conclusion announced in the third paragraph of the opinion. We have not at any time doubted the correctness of the opinion in other respects, and therefore limit our present inquiry to this one subject. In said instruction the jury was told, in effect, that it was not necessary that they find that the defendant had in person received the deposit, nor that he was personally present when it was received; that it was enough if it was received by the cashier or agent of the defendant under his authority; that though the defendant instructed his cashier to close the bank, and refused to receive further deposits; and that thereafter the cashier did <sup>200</sup> accept and receive this deposit. "Still, if the defendant, with knowledge thereof, accepted and retained as a deposit the amount so received from said Mohling, by said Theodore Eifert, and placed among and treated it as a part of the funds or assets of the bank, having full knowledge

from what source and under what circumstances and by whom it was received, he will be deemed to have knowingly accepted such sum as a deposit."

Appellant's first complaint in his argument on rehearing is that there is no evidence to warrant that part of the instruction to the effect that it was not necessary that the defendant should have received the deposit in person, or have been personally present, nor that it was enough if it was received under his authority. It is true there was no evidence to which this part of the instruction, taken alone, could apply; but it was a correct statement of the law, and aided to make plain that which followed in the instruction. Appellant insists that in what follows in said instruction the court attempts to apply to this criminal charge the principle of ratification. He contends that a criminal act cannot be ratified, and cites in support 1 American & English Encyclopedia of Law, 430, and the cases therein referred to. The instruction does not submit the question of defendant's accepting and receiving the deposit by a ratification of what the cashier had done. It rests the question of accepting and receiving upon whether the defendant retained the deposit, and placed and treated it as part of the assets of the bank, with full knowledge of the circumstances under which it had been received by the cashier. The doctrine of ratification is not invoked to charge the defendant with having accepted and received the deposit as of the time it came into the hands of the cashier. The case was submitted upon the inquiry as <sup>201</sup> to whether the defendant accepted and received the deposit after being informed of the circumstances under which it had come into the hands of the cashier. In the instruction under consideration, the jury was told that if the defendant, with knowledge of the circumstances under which the deposit was received, accepted and retained it as a deposit, and placed it among and treated it as a part of the assets of the bank, "he will be deemed to have knowingly accepted such sum as a deposit." In the former opinion we said: "It seems to us that when defendant, after full knowledge of all the facts, on the evening after his return, failed to repudiate the act of his son, and took no steps looking to the return of the deposit to Mr. Mohling, he then knowingly received and accepted the deposit."

Appellant contends that, if the defendant and his bank were insolvent at the time the money was received, Mr. Mohling could pursue it as a trust fund in the hands of either the de-

fendant or his assignee, and recover it in kind, or its equivalent, if it had been so mixed with other money as to destroy its identity. He cites *Wasson v. Hawkins*, 59 Fed. Rep. 233, and *American Trust etc. Bank v. Gueder etc. Mfg. Co.*, 150 Ill. 336. Whether such is the law we need not determine, for, if it be, it would apply with equal force if the deposit had been received by the defendant in person, or by his authority. If it be conceded that Mr. Mohling had the right to pursue that deposit as a trust fund, it does not follow that defendant did not knowingly receive and accept it. He not only failed to repudiate the act of his son in receiving the deposit, and failed to return it, but, within four days after its receipt, included that money in a general assignment made by him for the benefit of his creditors. We have <sup>202</sup> re-examined the case with care, and reached the conclusion that the former opinion is correct, and it is therefore adhered to.

Affirmed.

ROBINSON, J., dissented from that portion of the charge of the court referring to the consequences of the defendant's retaining the deposit, after knowledge of the circumstances under which it was received. He also claimed that the evidence was not sufficient to support the verdict. The law, he said, does not forbid an insolvent banker from retaining a deposit properly received, but from accepting or receiving it; and whether the defendant is guilty does not depend merely upon his having retained the deposit in question, but whether, by his acts, he accepted or received it, within the meaning of the statute, mentioned in the opinion, after he knew that it had been received by his agent in violation of his instructions. The evidence showed, he said, that the son did not obey the message because he thought that his father took too gloomy a view of the situation; and that the defendant was dissatisfied that his order had not been obeyed, but did nothing with the money received. "There is no evidence, whatever," said his honor, "that he placed it among the assets of the bank. It had been received and placed with the funds of the bank by his son. There is no pretense that it had been kept apart from the money previously in the bank, nor that it could have been identified and treated as a special deposit. It is not shown that the defendant took actual possession of it, but it seems to have remained where the son placed it until the assignment for the benefit of creditors was made. The bank was never opened after it was closed by the son, as stated. When he received the deposit of Mohling, the amount was entered in the pass-book of the latter, and it is not shown that any other entry was made in any book until after the assignee had taken possession of the bank. The son then asked of the assignee the privilege of posting in the books the work done on the fifteenth of August. Mohling never



made any demand for the return of the money he had deposited, and it does not appear that it was ever suggested to the defendant by anyone that the deposit should be refunded before he made the assignment for the benefit of creditors. The entire amount due Mohling, including the deposit in question, was five hundred and forty-eight dollars and forty-four cents; and it is shown that, before the assignment was completed, the defendant endeavored to have Mohling commence suit, aided by attachment, to recover the amount due him, and represented that, if he would do so, he would obtain all of it. The total amount due Mohling, including the deposit in question, was set out in the schedule of claims attached to the assignment, but the defendant did not prepare the schedule. That was done by his attorney and his son, and he does not appear to have given the fact that the Mohling claim included the deposit in question any thought, but, if he had purposely included it, that fact would not have shown that he had accepted or received the money. That had been done, in violation of his instructions, by his son, and the money so mingled with the funds of the bank that it could not be identified. The unauthorized act of the son was effectual to create between the defendant and Mohling the relation of debtor and creditor; Independent Dist. v. King, 80 Iowa, 497, 500; because it was the right of Mohling, in the absence of actual knowledge of the limitation upon the power of the son, to rely upon the apparent authority with which the defendant had clothed him to receive the deposit. The relation stated, having been established, it could not have been changed, and the money given the character of a special deposit, without the consent of Mohling. It is not shown that the defendant attached to his assignment an inventory of his assets, and the record is entirely barren of evidence to show that he had any intent, in making the assignment, to appropriate to his own use any money or other property which belonged to Mohling, or to alter their relation in any manner. The assignee acquired only the right of the defendant in the property assigned: Meyer v. Evans, 66 Iowa, 179, 183; Independent Dist. v. King, 80 Iowa, 497, 501. If Mohling had any special interest in or lien upon the property assigned while it was in the hands of the defendant, that interest or lien could have been enforced against the assignee: Bruner v. Bank, 97 Tenn. 540. It is my opinion that the evidence is sufficient to show a civil liability only; that it wholly fails to show that the defendant accepted or received the deposit in question within the meaning of the statute; and that it does not show any act on his part done with a wrongful intent, or from which a wrongful intent should be presumed."

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WITNESSES.—CROSS-EXAMINATION extends only to the subjects covered by the direct examination: Enos v. St. Paul etc. Ins. Co., 4 S. Dak. 639; 46 Am. St. Rep. 796, and note, showing that it should not include new matter. If the accused voluntarily testifies in his own behalf, he occupies the same position as any other wit-

ness, is liable to be cross-examined as to any matters pertinent to the issue, may be contradicted and impeached as any other witness, and is to be subjected to the same tests: *Quintana v. State*, 29 Tex. App. 401; 25 Am. St. Rep. 730. A party is allowed to cross-examine as to new matter which is a part of the *res gestae*. A party is entitled to bring out every circumstance relating to a fact which an adverse witness is called to prove: *Bank v. Fordyce*, 9 Pa. St. 275; 49 Am. Dec. 561.

**INSTRUCTIONS—CONSTRUCTION.**—If an instruction contains a complete statement of a proposition of law applicable to the facts in a given case, it is good as part of a series containing the entire law of the case. All of the instructions must be considered together, and construed with reference to each other: *Taylor v. Wootán*, 1 Ind. App. 188; 50 Am. St. Rep. 200.

## SWIFT v. CALNAN.

[10: IOWA, 206.]

**PARTY-WALLS—SPECIAL AGREEMENT AS TO, NOT IN WRITING—WHEN VALID.**—If one of the owners of adjoining and contiguous lots, fronting upon the same street, builds a party-wall on the line between the two lots, upon the other owner's express oral promise and agreement to pay one-half the value thereof upon its use by him, the former may, without reference to the party-wall statute requiring special agreements about such walls to be in writing, recover upon the promise, as at common law, when the latter uses the wall.

**PARTY-WALLS — PAROL CONTRACT CONCERNING — VALIDITY OF.**—If a contract is the same, in fact, as that which the law makes for the parties, it is not void. Hence, if a contract as to a party-wall is not different from that which the law makes, it is not void because it is in parol, although the party-wall statute requires special agreements about such walls to be in writing.

**STATUTES—CONSTRUCTION—INVALID PROVISIONS.**—To arrive at the correct interpretation of an act claimed to be unconstitutional, the invalid portions of the act may be considered in construing its other provisions which are confessedly good.

**EQUITY—DISMISSAL—REMEDY AT LAW.**—Under a statute which provides, in effect, that an error as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings, and a transfer to the proper docket, the fact that an action at law is the proper remedy upon a certain contract is no ground for the dismissal of a suit, in equity, upon such contract.

**PARTY-WALLS—STATUTE—CONSTITUTIONALITY OF—TAKING OF PRIVATE PROPERTY.**—The validity of a party-wall statute which gives a lot-owner the right to build a wall not more than eighteen inches wide, one-half upon the land of his neighbor, and to recover from the latter one-half the expense thereof when he shall use the wall, is not free from doubt, but, as it is not plainly unconstitutional, in contravening provisions with reference to private property, it will be upheld as a valid exercise of the police power, and as resting on the principle that equality is equity.

**PARTY-WALLS—STATUTE—CONSTITUTIONALITY OF—LONG-CONTINUED ACQUIESCENCE.**—A party-wall statute giv-

ing a lot-owner the right to build a wall not more than eighteen inches wide, one-half upon the land of his neighbor, and to recover from the latter one-half the expense thereof when he shall use the wall does not so plainly violate a constitutional provision prohibiting private property to be taken for private use without compensation, that it can be held invalid where it has been generally accepted and recognized as valid and enforceable for more than forty years.

**MECHANIC'S LIEN—CONTRACT AS TO PARTY-WALL.—**

While an express promise to pay one-half of the value of a party-wall is enforceable against an adjoining owner who uses the wall, the plaintiff is not entitled to a mechanic's lien on the defendant's property for such amount.

Suit in equity to establish and foreclose a mechanic's lien, brought by the Swifts against Calnan. The parties owned adjoining and contiguous lots, fronting upon the same street. The Swifts, in November, 1892, built a stone and brick wall, thirteen inches wide, upon the line between the two lots, so that it could and would be a wall in common. This was done with the knowledge and consent of Calnan, who agreed, before the wall was built, that it should be a wall in common, and promised and agreed to pay one-half the value thereof upon its use by him. Calnan erected a structure on his lots, in August, 1894, and used and appropriated the wall. The cost of the wall was one thousand and eighty-nine dollars, and this suit was brought to recover one-half of that amount, and to establish and foreclose a mechanic's lien for the latter sum upon the defendant's lot. The defendant demurred to the plaintiffs' petition, which recited these facts, on the ground that they were not entitled to any relief. The demurrer was sustained and the plaintiffs appealed.

Hayes & Schuyler, for the appellants.

Walsh Brothers and McCoy Brothers, for the appellee.

**210** DEEMER, J. In support of the ruling of the lower court appellee insists: 1. That under the facts recited, plaintiffs are not entitled to a mechanic's lien; 2. That the action is barred by the statute of limitations; 3. That the action cannot be maintained, because based upon oral contract, the statute providing that such agreements must be in writing; 4. That the party-wall statute, giving one person the right to build upon the land of his neighbor, is unconstitutional and void; 5. That, such statute being void, no recovery can be had for a wall erected thereunder; and 6. That where a building wrongfully laps over upon another's land, said person has the right to use it without making compensation. In the statement preceding this



opinion, it will be noticed that plaintiffs built the wall upon the dividing line between the two lots, with the knowledge and consent of the defendant, and with the promise on his part to pay one-half the cost thereof as soon as he should use it. Without reference to the party-wall statute, plaintiffs were licensees, and, having rested half their wall on the defendant's land under an express promise by defendant to pay therefor when he should use it, there is no reason why they cannot, as at common law, recover upon the promise: *Rindge v. Baker*, 57 N. Y. 209; 15 Am. Rep. 475; *Bodell v. Nehls*, 85 Iowa, 164; *Zugenbuhler v. Gilliam*, 3 Iowa, 391; *Day v. Caton*, 119 <sup>211</sup> Mass. 513; 20 Am. Rep. 347. It is said, however, that action is predicated upon the party-wall statutes, and that such an agreement cannot be proven by parol. These statutes, so far as material, are as follows: "In cities, towns, and other places surveyed into building lots, the plats whereof are recorded, he who is about to build contiguous to the land of his neighbor may, if there be no wall on the line between them, build a brick or stone wall at least as high as the first story, if the whole thickness of such wall above the cellar wall does not exceed eighteen inches, exclusive of the plastering, and rest one-half of the same on his neighbor's land; but the latter shall not be compelled to contribute to the expense of said wall": Code, sec. 2019. "If his neighbor be willing and does contribute one-half of the expense of building such wall, then it is a wall in common between them, and if he refuses to contribute to the building of such wall, he shall yet retain the right of making it a wall in common by paying to the person who built it one-half of the appraised value of said wall at the time of using it": Code, sec. 2020. "Every proprietor joining a wall, has, in like manner, the right of making it a wall in common, in whole or in part, by repaying to the owner of the wall one-half of its value, or the one-half of the part which he wishes to hold in common, and one-half of the value of the ground on which it is built, if the person who has built the wall has laid the foundation entirely upon his own ground": Code, sec. 2027. "This chapter shall not prevent adjoining proprietors from entering into special agreements about walls on the lines between them; but no evidence of such agreements shall be competent unless it be in writing, signed by the parties thereto, or their lawfully authorized agents": Code, sec. 2030. Now, we have held that when <sup>212</sup> the contract is the same in fact as that which the law makes for the parties, it is not within the meaning of this section: *Wickersham v. Orr*, 9

Iowa, 253; 74 Am. Dec. 348. The contract relied upon in this case is not different from that which the law made, and it is not void because it was in parol. It is said, however, that sections 2019, 2020, and 2027 are unconstitutional, because they authorize the taking of private property for private use, and without compensation. Concede, for the purpose of the case, that this is so; yet how does this affect the validity of the contract made between the parties? If these sections were held unconstitutional and void, in so far as they authorize the building of a wall upon the property of another, they certainly should be considered in construing another section which appellee relies upon and concedes to be valid. While no right may be based upon an unconstitutional act, part of its provisions may be considered in construing other provisions, confessedly good, in arriving at the correct interpretation of the latter. Appellee contends, however, that the agreement, if good, cannot be enforced, because this is a suit in equity, and that remedy upon the contract must be by action at law. The ready answer to this contention is the statute (Code, sec. 2514), which provides, in effect, that an error as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings, and a transfer to the proper docket: See *Mills v. Hamilton*, 49 Iowa, 105; *Conyngham v. Smith*, 16 Iowa, 471; *Lewis v. Soule*, 52 Iowa, 11; and many other cases noted in McClain's Code and Supplement, sec. 3719. It is argued, however, that this action is founded upon the party-wall statute, and that this statute is unconstitutional, for the reasons before stated. That it comes very close to the line must be conceded. But <sup>213</sup> the fact that it has existed for more than forty years, and has been generally accepted and recognized as valid and enforceable, is strong reason for sustaining the act, even if we were disposed to doubt, as a new question, its constitutionality: *Cooley's Constitutional Limitations*, 86; *Wurts v. Hoagland*, 114 U. S. 606; *State v. Blake*, 36 N. J. L. 443; *Bingham v. Miller*, 17 Ohio, 446; 49 Am. Dec. 471. We think that the act in question is not so plainly in derogation of the constitution (art. 1, secs. 9, 18) as that we ought to hold it invalid. Indeed, in case of doubt, it is our duty to uphold the act. Titles to real estate are held subject to such legal conditions as may, from time to time, be established. They are subject to such statutory and police regulations as affect the safety and good order of society. A tract of land, from its mere location with respect to another, may owe it a servitude; and one must so use his own as not to

unnecessarily injure another. As said in the case of *Evans v. Jayne*, 23 Pa. St. 34: "The law relating to party-walls is no invasion of the absolute right of property. It prescribes simply a rule for the convenient, economical, and safe enjoyment of property by the owner." And we may add that such law prevents disputes and unseemly contentions between "neighbors," and, as an exercise of the police power, is valid: See, also, *Hunt v. Ambruster*, 17 N. J. Eq. 208. What are known as "betterment statutes," or, as they are denominated in the laws of this state, "occupying claimants' acts," have been sustained on substantially the same theory: See *Tiedeman's Limitation of Police Power*, 366, 367, et seq.; *Cooley's Constitutional Limitations*, 6th ed., 476-478, et seq.; *Childs v. Shower*, 18 Iowa, 261. Each of these enactments was borrowed from the civil law, and has for its basis the equitable doctrine that "equality is equity." Neither takes from the proprietor of the land anything except for benefits received. Nor can they be said to be violative <sup>214</sup> of the constitutional provisions with reference to private property for the reason that they adjust the equities of the parties as nearly as possible according to natural justice. Under the party-wall statute, the adjoining proprietor is not bound to contribute to the expense of the wall. No burden is cast upon him until he makes such use of it as to indicate that he desires to use the wall in common. At most, he parts with the use of not to exceed nine inches in width off the side of his land as an easement in favor of his neighbor. Compulsory easements for the public good are quite common to our law. See the law with reference to drains, dams, and division fences: *McClain's Code*, secs. 1826, 1845, 2322, et seq. There are some authorities which hold to a contrary doctrine: See *Wilkins v. Jewett*, 139 Mass. 29; *Allen v. Evans*, 161 Mass. 485; *Traute v. White*, 46 N. J. Eq. 437. What is said on the subject in this last case is purely dictum, and contrary to *Hunt v. Ambruster*, 17 N. J. Eq. 208. The other cases we do not regard as binding upon us, even if it be conceded they hold to a contrary doctrine. Although, as we have said, there is considerable doubt as to the validity of the statute, yet it is not so plainly in violation of the constitution as to require an adverse decision. Plaintiffs are entitled to a judgment at law for the value or cost of one-half the wall.

The question remains, Are they entitled to have a mechanic's lien established against defendant's property? It seems to us that they are not. When the defendant used and appropriated the wall, he became liable to pay plaintiffs one-half the value



thereof under the statute, or, it may be, under his contract. But this was a mere personal charge, and could not be enforced by establishing a lien upon the land: *Phillips' Mechanics' Liens*, sec. 78, and cases cited. Moreover, the material was not <sup>215</sup> furnished under a contract with the owner of the lot. There was simply an agreement to pay for material already furnished, or to be furnished at a subsequent time, and under other conditions than the mere furnishing of the material. Again, if the material was furnished under a contract with the owner, the statute of limitations is a complete bar to the action, for it must be brought within two years from the filing of the statement for the lien in the clerk's office, and this statement must be filed within ninety days after the material shall have been furnished: *Squier v. Parks*, 56 Iowa, 407. Plaintiffs are not entitled to a mechanic's lien, but they are entitled, under the allegations of their petition, to a judgment for one-half the value of the wall.

Reversed.

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**PARTY-WALLS—VERBAL AGREEMENTS—ACTION.**—To recover half the cost of a party-wall it is not essential that the agreement be in writing. An action may be maintained on an oral agreement between adjoining owners that one shall erect a party-wall and the other pay half the expense, if the wall is built before any revocation: See monographic note to *Bloch v. Isham*, 92 Am. Dec. 299, 301, on the law of party-walls. An action at law will lie to recover of one using a party-wall his proportion of the costs of the same; *Walker v. Stetson*, 162 Mass. 86; 44 Am. St. Rep. 350. In some of the states it is provided by statute that an adjoining owner may build a party-wall one-half upon the land of his neighbor, and that the latter, when he uses the wall, must pay one-half of its cost: Note to *Bloch v. Isham*, 92 Am. Dec. 305. These rights and liabilities are, by some of the statutes, extended to the grantees of former owners: Notes to *Everett v. Edwards*, 14 Am. St. Rep. 469; *Bloch v. Isham*, 92 Am. Dec. 305. That a covenant to pay the owner of an adjoining lot one-half the cost of a party-wall erected by him when the covenantor should use the wall is a personal covenant and does not pass to the grantee of the covenantee, see *Bloch v. Isham*, 28 Ind. 37; 92 Am. Dec. 287; *Cole v. Hughes*, 54 N. Y. 444; 13 Am. Rep. 611. Contra, *Sharp v. Cheatham*, 88 Mo. 498; 57 Am. Rep. 433; *Richardson v. Tobey*, 121 Mass. 457; 23 Am. Rep. 283.

**STATUTES — CONSTITUTIONALITY — CONSTRUCTION.** — A law will not be declared unconstitutional unless it is clearly and palpably in violation of the constitution: *Hanna v. Young*, 84 Md. 179; 57 Am. St. Rep. 396. In the construction of a statute every part of it must be viewed in connection with the whole: Note to *Belle-ville etc. R. R. Co. v. Gregory*, 58 Am. Dec. 600. All sections of a statute, and all statutes upon the same subject, must be construed together: Note to *Riggs v. Palmer*, 12 Am. St. Rep. 827. The construction of a statute long acted on by the people will be adopted by the courts if not directly contradictory to its terms: Note to *Bank of Utica v. Mersereau*, 49 Am. Dec. 232.

**EQUITY—DISMISSAL—REMEDY AT LAW.**—If a complainant in equity has a perfect remedy at law, and that objection is made to appear by demurrer or answer, the bill must be dismissed: *Colton v. Ross*, 2 Paige, 396; 22 Am. Dec. 648.

BARRIS v. CHICAGO, BURLINGTON & QUINCY RAILWAY  
COMPANY.

[102 IOWA, 375.]

**RAILROADS—CONSTRUCTION OF STATUTE—EFFECT OF SCHEDULED RATES FIXED BY COMMISSIONERS.**—The schedule of rates fixed by the railroad commissioners under the Iowa statute, which provides that such schedules shall, in all suits brought against railroad corporations in that state, and which, involve the reasonableness of transportation charges on freight, be deemed, in all courts of the state, as prima facie evidence that the rates therein fixed are reasonable and just maximum rates, is not conclusive as to either shipper or carrier, concerning the question involved, but is merely prima facie evidence that such rates are reasonable. Hence, a shipper may recover triple damages, authorized by the statute, as for an overcharge, where the charges are, in fact, unreasonable, although the rates charged are no more than those fixed by the commissioners' schedule.

Action to recover damages for overcharges in railroad rates. The plaintiff firm, Barris & Co., during June, 1893, and up to July 20th, of that year, shipped over the defendant's line of road, in carload lots, sand from different points in Iowa, to Creston, Iowa, for which the company received payment. The plaintiff averred that there was an overcharge, in excess of reasonable rates, to the extent of three hundred and thirteen dollars and thirty-eight cents, and sought to recover three times that sum under the provisions of the statute. The answer denied excessive charges, and averred that the rates charged were those fixed by the state board of railway commissioners. It was, therefore, denied that there was any cause of action. There was a judgment for the defendant, and the plaintiff appealed.

Harl & McCabe and Spencer Smith, for the appellants.

Wright & Baldwin, for the appellee.

**376 GRANGER, J.** The facts appear mainly by stipulation. The schedule of rates as provided by the board of railroad commissioners of this state, and in operation from 1889 to March 1, 1893, fixed the rate for sand the same as for soft coal. By a provision of the tariff rates that took effect March 1, 1893, the classification of sand was changed to class E, which gave it a higher rate. Because of a complaint to the commissioners, of which the defendant company had notice, on July 20, 1893, sand was changed to its former classification, with a rate the same as soft coal. The difference in the schedule rates between that of soft coal and class E which the company received makes the excess of charges for which this suit is brought, and hence

it will be seen that the rates charged did not exceed the rates specified in the commissioners' schedule of rates. The district court found the rates charged to be actually unreasonable, but held that, as the rates charged did not exceed the schedule rates, there could be no recovery; and we are to determine the correctness of the holding as to the effect of the schedule rates. It is the provisions of chapter 28 of the Acts of Twenty-second General Assembly, that give rise to plaintiff's cause of action, if it is to be sustained. Sections 2 and 9 of the act are as follows:

**377** Sec. 2. "All charges made for any service rendered or to be rendered in the transportation of passengers or property in this state, as aforesaid or in connection therewith or for the receiving, delivering, storage or handling of such property shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Sec. 9. "In case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited, or declared to be unlawful, or shall omit to do any act, matter, or thing, in this act required to be done, such common carrier shall be liable to the person or persons injured thereby, for three times the amount of damages sustained in consequence of any such violation of the provisions of this act, together with costs of suit and a reasonable counsel or attorney's fee to be fixed by the court in which the same is heard on appeal or otherwise, which shall be taxed and collected as part of the costs in the case; provided that in all cases demand in writing on said common carrier shall be made for the money damages sustained before suit is brought for recovery under this section, and that no suit shall be brought until the expiration of fifteen days after such demand."

As there is no controversy over the question of fact as to the charges being unreasonable, considered independent of the act in question, if there is nothing in the act to affect the result, the sections quoted justify a recovery, for section 9 in terms creates a liability for doing any of the acts prohibited by the chapter, and section 2 in terms prohibits the taking of unreasonable rates. Section 17 of the act contains the following provision: "The board of railroad commissioners of this state are hereby empowered and directed to make for each of the railroad corporations, **378** doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of freight and cars on each of said railroads, and said power to make schedules shall include the power of classification of all such freights, and it shall be the duty of said



commissioners to make such classification; provided, that the said rates of charges to be so fixed by said commissioners shall not in any case exceed the rates which are or may hereafter be established by law; and said schedules so made by said commissioners shall in all suits brought against any such railroad corporations, wherein is in any way involved the charges of any such railroad corporation for the transportation of any freight or cars or unjust discrimination in relation thereto, be deemed and taken in all courts of this state as prima facie evidence that the rates therein fixed are reasonable and just maximum rates of charges for the transportation of freight and cars upon the railroads for which said schedules may have been respectively prepared." We think it is nowhere claimed that the commissioners' schedule is intended to deprive the railway company of reasonable rates for transportation of freight; that is, if the schedule makes a rate that is less than reasonable, the company may recover the reasonable rate, and in any action by the company to recover a rate in excess of the schedule rate the only effect of section 17 would be to make the schedule rate prima facie reasonable, so that the company must overcome that effect by proof. The language of section 2 is that "all charges . . . shall be reasonable and just." It is no more restrictive than permissive. It fixes the rights of both parties by a re-enactment of the common law. Confessedly, section 17 does not operate to the prejudice of the company, if the commissioners shall err in judgment, and fix a rate less than what is reasonable. It seems <sup>379</sup> to us the section has the same force and effect as to both parties. If the commissioners err in judgment, and fix a rate too high to be reasonable, why should the shipper be required to pay it, or the company, if it receives it, be permitted to keep it? It will be seen that section 17, when carefully read, does not attempt to deal with facts or conditions that are conclusive, but those that are prima facie only. Largely, its office is to fix a rule of evidence. That is one of the purposes of the act, as indicated by its title. It is likely true that the purpose of the act, as to evidence, may have been intended more for proceedings before the commissioners than in courts; but it is equally true that it does fix a rule of evidence in courts. Some authorities are cited and relied on in support of appellee's position, which we should notice. The one apparently most relied on is reported in Chicago etc. R. R. Co. v. People, 77 Ill. 443. The statutes, so far as material, in that state and this, are so similar that a holding by that court to

the effect that an observance of the schedule rate by the company would defeat a recovery for charges in excess of a reasonable rate would be a direct and high authority on the subject in this state. But, as we understand, a majority of the members of that court expressly dissent from such a conclusion. The opinion in that case, in which the conclusion of the majority is announced, deals only with such a question, barring, perhaps, a question of pleading. In that opinion the constitutionality of the act is not considered. Two members of the court dissent from the "reasoning of the opinion" which went to the proposition we are considering, and they "especially" dissent so far as the opinion may assume the constitutionality of the law. Their concurrence in the conclusion is placed, evidently, on the unconstitutionality of the law. Two of the other justices dissent from both the <sup>380</sup> reasoning and conclusion, so that but three members are left to concur in the reasoning of the opinion, being a minority. If the case can be said to be an authority on this particular question, we think it sustains our view; but it is probably fair to say that, because of the different grounds on which rest the different conclusions, the case is not valuable as authority. The rule of appellee's contention is sustained in a somewhat recent case in Missouri: *McGrew v. Missouri Pac. Ry. Co.*, 114 Mo. 210. That case is made to turn on certain provisions of the Revised Statutes of that state of 1889, the opinion citing some of the sections from 2631 to 2639. We have examined the statutes, and find no similar provision to ours as to the effect of scheduled rates. In section 2639 we find language to the effect that when rates are established in accord with the provision of the act, it shall be unlawful for the carrier to receive either more or less than the established rate, except when specially permitted so to do. This particular language is not referred to in the opinion in the Missouri case, but that case cites *Sorrell v. Central R. R. Co.*, 75 Ga. 509; and the Missouri case, speaking of the Georgia case, says it was decided "under a statute almost exactly like the statute under consideration, where a suit was brought against a railroad company on account of alleged overcharges beyond a reasonable rate. It was held that, as the declaration did not allege either that no rates had been fixed for the defendant road, or that the charges were beyond the rates so fixed, it was demurrable." The statute of Georgia (Code, sec. 719f) provides that the schedule shall "be deemed sufficient evidence that the rates therein fixed are just and reasonable rates." The

court, in its opinion, after citing the statute, says: "Thus the statute law of the state fixes, through commissioners appointed therefor, just and reasonable <sup>381</sup> rates of freight, and makes these schedule rates evidence, and sufficient evidence, of the justness and reasonableness of the freights exacted by the railroad companies in all the courts of this state." It will be seen that the statutes in which the rulings were made in Missouri and Georgia are so unlike ours as to make the holdings therein of no force in construing ours. These are the only authorities cited on this question from any court of appeals. With the language of our statute, we are not in doubt as to a proper conclusion. It would seem to be a strange construction to so construe the language of the law as to make the schedules but prima facie as to the carrier and conclusive as to the shipper. Equality before the law is the correct rule, and should obtain in the absence of a clear legislative intent to the contrary.

Appellant has discussed the right to recover triple damages. Appellee has not discussed that proposition, and, indeed, there seems to be but little room for discussion under the language of the law. The right to such damages seems to follow a right of recovery.

The judgment is reversed.

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**RAILROADS—COMMISSIONERS' SCHEDULE RATES—EVIDENCE OF REASONABLENESS—OVERCHARGE—DAMAGES.—**A common carrier is bound to carry for a reasonable remuneration, and an action lies, after payment, to recover back an overcharge by a carrier: Note to Cook v. Chicago etc. Ry. Co., 25 Am. St. Rep. 520. In Minnesota, the determination of the railroad commission as to what is a proper tariff is conclusive, but in Nebraska, Florida, and Illinois the schedules of the commission are only prima facie evidence of the reasonableness of the charges fixed: Note to Burlington etc. Ry. Co. v. Dey, 31 Am. St. Rep. 501; Chicago etc. R. R. Co. v. Jones, 149 Ill. 361; 41 Am. St. Rep. 278. A statute authorizing railroad commissioners to establish a schedule of rates of freight and fares to be charged by railroad companies, simply prescribes a rule of evidence: Burlington etc. Ry. Co. v. Dey, 82 Iowa, 312; 31 Am. St. Rep. 477; Chicago etc. R. R. Co. v. Jones, 149 Ill. 361; 41 Am. St. Rep. 278. The courts still have power to determine what is reasonable: Chicago etc. R. R. Co. v. Jones, 149 Ill. 361; 41 Am. St. Rep. 278; and such a statute does not prevent the companies from having the acts of the commissioners in fixing rates of charges reviewed in the courts of the state: Burlington etc. Ry. Co. v. Dey, 82 Iowa, 312; 31 Am. St. Rep. 477. See monographic note to San Diego W. Co. v. San Diego, 118 Cal. 556; 62 Am. St. Rep. 261.



## BENNETT v. CITY OF MARION.

[102 IOWA, 425.]

**DAMAGES, EXEMPLARY—MUNICIPAL CORPORATIONS.**  
Exemplary damages cannot be awarded against a municipal corporation, unless expressly authorized by statute.

Action for damages against the city for polluting and rendering unfit for plaintiff's use the water of Indian creek, by the discharge therein of sewerage from the city. This creek crossed the plaintiff's land. The plaintiff obtained a judgment and the city appealed.

Richard A. Stuart and Jamison & Smyth, for the appellant.  
Rickel & Crocker, for the appellee.

**425** GRANGER, J. A suit between these parties for the same cause was determined in the superior court in September, 1894, in which the jury found for the plaintiff in the sum of three hundred dollars, and there was a special finding by the jury that the sewer as maintained was a nuisance. The plaintiff in this suit pleaded the judgment in that suit as a basis, as we understand, for exemplary damages in this suit, and the court instructed the jury that such damages might be awarded if the defendant, after such verdict, **426** and judgment, continued the flow from its sewer in wanton disregard of plaintiff's rights. The record presents the question if exemplary damages may be awarded against a municipal corporation. It may be conceded that the record in this case is such a one as would have fully warranted the instruction in a case where such damages are legally allowable. No case in this state is a direct authority on the subject. Such cases as *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499, and *Vanhorn v. Des Moines*, 63 Iowa, 447, 50 Am. Rep. 750, in so far as they announce a principle touching the question, are against the right of such a recovery. While the rule of compensatory damages has been sustained against municipal and quasi municipal corporations in this state, and, in some cases, under very aggravated conditions, the right to exemplary damages against such corporations has not been thought a right. Mr. Dillon, in his work on *Municipal Corporations* (sec. 1020), says: "Actual damages only can, in general, be recovered. The case would be exceptional, indeed, when the plaintiff could properly recover vindictive, or more than compensatory, damages." Mr. Sutherland, in his work on *Damages* (sec. 412), says, "Municipi-

pal corporations cannot be subjected to vindictive damages." This is a well-established rule in Illinois: *Chicago v. Kelly*, 69 Ill. 475. The same rule is announced in West Virginia: *Wilson v. Wheeling*, 19 W. Va. 323; 42 Am. Rep. 780. The principle also has support in *Hunt v. Boonville*, 65 Mo. 620; 27 Am. Rep. 299. See, also, *Thompson on Negligence*, sec. 1265. The cases on the subject do not appear to be numerous. The references by the text writers are, generally, to the same cases. California seems to be an exception to the rule denying such damages, but it is because of a statute giving such damages in express terms: See *Myers v. San Francisco*, 42 Cal. 215. We have seen no case sustaining the rule of the instruction <sup>427</sup> independent of express statutory provisions, and we think on principle, as well as authority, such damages are not allowable.

The judgment will stand reversed.

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**DAMAGES, EXEMPLARY—MUNICIPAL CORPORATIONS.**—Exemplary or punitive damages cannot be recovered against a municipal corporation independently of express statutory provisions: See monographic note to *Hoboken Printing etc. Co. v. Kahn*, 59 Am. St. Rep. 602, on the liability of corporations for exemplary damages.

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## GREENLEE v. NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

[102 Iowa, 427.]

**INSURANCE—MECHANICS' LIENS—CHANGE OF INTEREST—EXECUTION SALE—REDEMPTION.**—If property against which mechanics' liens have been filed is insured, the policy forbidding "a change in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or by voluntary act of the insured, or otherwise," a foreclosure of the liens, a sale of the property under execution, and the issuance of a certificate of purchase to the judgment creditor, before the loss, do not change the interest of the insured, where the period of redemption had not expired at the time of the fire.

**INSURANCE—MECHANICS' LIENS—INCREASE OF HAZARD—EXECUTION SALE.**—If property against which mechanics' liens have been filed is insured, the policy for bidding any increase of hazard, a foreclosure of the liens, and a sale of the property under execution, do not, in the absence of evidence, show any increase of hazard.

**INSURANCE—INCREASE OF HAZARD.—CHANGES** in the form of an existing lien do not, as a matter of law, amount to an increase of hazard.

**INSURANCE—INCREASE OF RISK.—THE BURDEN** of proving an increase of risk is on the insurer.

**INSURANCE—CHANGE OF RISK—INCREASE OF HAZARD.**—Proof of a change of risk is not proof of an increase of hazard, without it appears that the change has increased the hazard.

Action brought by T. F. Greenlee and J. F. Atkinson upon a policy of fire insurance. The defense was that there had been a breach of condition against encumbrances, and of a further condition against change of interest, title, or possession by legal process, judgment, or voluntary act of the insured, or otherwise. The reply was a denial, and also a claim of waiver. A verdict was directed for the plaintiffs and the insurance company appealed.

McVey & McVey, for the appellant.

J. J. Mosnat, for the appellees.

**428 DEEMER, J.** The property insured was a store and operahouse building and fixtures, situated in the city of Belle Plaine; and the policy contains these, among other, conditions: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the hazard be increased by any means, within the control or knowledge of the insured, . . . or if the interest of the insured be other than unconditional and sole ownership, . . . or if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed, or if any change other than by the death of the insured take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise." At the time the policy was issued, mechanics' liens had been filed against the property, one by Robert Smith, who claimed six hundred and twenty-two dollars and sixty cents; and another by J. F. Atkinson, who claimed nine thousand four hundred and seventy-three dollars and sixty-eight cents. Thereafter, and before the loss, these mechanics' liens were reduced to judgments, and foreclosure decrees and an execution had issued upon the Atkinson judgment and the property was advertised and sold, and a certificate had issued to Atkinson as purchaser. The period for redemption had not expired, however, at the time **429** of the fire. The defendant pleaded that these foreclosures, and the sale of the property to Atkinson, constituted a breach of the conditions of the policy above set out. By the terms of the policy, the loss, if any,



was made "payable to J. F. Atkinson, as his interest may appear."

Appellant claims in argument that the judgments and decrees of the court foreclosing these mechanics' liens, and the sale of the property under the Atkinson decree, come within the express terms of the policy, forbidding "a change in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or by voluntary act of the insured, or otherwise." Now, it is clear that the judgment and foreclosure proceedings did not change either the title or possession of the property. During the period for redemption, Greenlee, who was the owner of the property, held both the title and right of possession, and was entitled to the rents and profits thereof. Did these proceedings change the interest of the assured? The word "interest," as used in the policy, means the share, portion, or part that the assured had in the property; and, in order to determine whether or not there was a change by the proceedings complained of, we must see whether there was any change in his right. What share or portion had the assured in the property before the foreclosure proceedings and sale thereunder that he did not have afterward? If the mechanics' liens were in fact liens upon the property at the time the policy was issued, the judgments and the sale under execution were no more. If they created no title, neither did the judgments, nor the sale on execution. In other words, neither the judgments nor the sale on execution created any new interest or estate. At most, a mere lien which was uncertain in amount, was made certain and conclusive, and an <sup>430</sup> indefinite period of redemption was made certain and definite. But neither of these things changed in any respect the share or part that the assured had in the property. In the case of *Curtis v. Millard*, 14 Iowa, 128, 81 Am. Dec. 460, we said, in speaking of the estate created by a sale under execution: "Now, the courts have frequently declared that the purchaser of lands on execution acquires by his purchase no more than a lien upon the lands for the amount of his bid and interest. During the time allowed for redemption, he acquires no right or estate upon which he could maintain ejectment, or which could be levied upon and sold for his debts. It is simply an inchoate or conditional right to an estate, liable to be defeated any time within one year by the payment of the purchase money and interest." So, also, in the case of *Stanbrough v. Daniels*, 77 Iowa, 567, we said that one who held a certificate

of purchase upon foreclosure proceedings is, during the year allowed by law for redemption, only a lienholder. Atkinson, then, was a mere lienholder at the time the fire occurred. He was also a lienholder for the same amount when the policy was issued, for the record shows that he bid no more than the amount of his judgment for the property. True, the amount was not ascertained and fixed until the judgment was rendered, but the lien existed for the true amount before as well as after judgment. The fixing of the period for redemption did not change the interest, portion, or share that the assured had in the subject of the lien. In a certain sense, Greenlee had nothing but an equity of redemption in the property, uncertain as to time within which it should be exercised before judgment, certain and fixed afterward. It appears to us that there was no substantial violation of the conditions of the policy above referred to. In the case of *Wood v. American etc. Ins. Co.*, 149 N. Y. 382, 52 Am. St. Rep. 733, the court, in construing a like <sup>431</sup> condition in a policy, said, in speaking of the effect of a sale upon execution: "At the time, therefore, that the property in question was destroyed by fire, the interest, title, or possession of the insured had not been changed. The statute (which is much like ours) had operated to postpone the effect of the sale upon the interest, title, or possession of owners until the expiration of the period for redemption." We have held that an interest in real estate is something more than a right to a remedy against it, and a lien therefor, whether special or general, is not an interest in lands: *Andrews v. Burdick*, 62 Iowa, 714. As the sale upon execution gave to Atkinson nothing more than a lien, or at most an inchoate or conditional right to an estate, he acquired no interest in the property; and, if he acquired no interest, Greenlee lost none. We do not overlook a statement made in the case of *Shimer v. Hammond*, 51 Iowa, 401, to the effect that a purchaser at execution sale holds the equitable title to the property. But it is manifest that such statement was not essential to the determination of the controversy, and should therefore be regarded as dictum. It will be noticed that the conditions of the policy sued upon in this case do not avoid the policy in the event that the property should be encumbered by judgment, as did the provisions in the policies involved in the cases of *Penn Mut. Fire Ins. Co. v. Schmidt*, 119 Pa. St. 449, and *Hench v. Agricultural Ins. Co.*, 122 Pa. St. 128, 9 Am. St. Rep. 74, relied upon by appellant. Hence these cases are not in point. Neither is the

case of *Hicks v. Farmers' Ins. Co.*, 71 Iowa, 119, 60 Am. Rep. 781, for the reason above stated, and for the further reason that it is expressly held in *Lodge v. Capital Ins. Co.*, 91 Iowa, 103, that a judgment is not an encumbrance, within the meaning of that term as used in insurance <sup>432</sup> policies, explaining and distinguishing the *Hicks* case. To avoid the policy in this case, the judgments or other proceedings must change either the interest, title, or possession of the subject of insurance. As we have seen, they did neither.

Appellant further contends that the judgments and execution sale violated the condition of the policy as to increase of hazard. We do not think this is so. The amount of the liens was in no manner increased, except, it may be, to the extent of the costs taxed in the case; and there was no evidence offered or introduced which tended to show that any increase of hazard resulted from the proceedings to enforce the mechanics' liens. We cannot presume that there was any such increase: *Russell v. Cedar Rapids Ins. Co.*, 71 Iowa, 69; *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa, 216; *Martin v. Capital Ins. Co.*, 85 Iowa, 643; *Runkle v. Hartford Ins. Co.*, 99 Iowa, 414; *Wood on Insurance*, sec. 243. Moreover, the condition last referred to does not apply to immaterial changes, which do not increase or enhance the risk. Changes in the form of an existing lien will not, as a matter of law, amount to an increase of hazard: *Wood on Insurance*, sec. 245. And the insurer has the burden of proving an increase of risk. Proof of a change in the risk, without more does not make out the defense. It must also appear that the change increased the hazard: *Wood on Insurance*, sec. 260. It is clear that the condition with reference to foreclosure sale of the property under mortgage or deed of trust was not violated. As none of the conditions of the policy were broken, the district court was right in directing a verdict for the plaintiff, and the judgment is affirmed.

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**INSURANCE—CHANGE OF INTEREST—EXECUTION SALE—REDEMPTION.**—A sale of real property under execution, when the statute gives the debtor time for redemption, and entitles him to remain in possession until the expiration of that time, does not avoid a policy of insurance containing a condition that it shall become void if any change, other than by the death of the assured, takes place in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or by the voluntary act of the assured, or otherwise: *Wood v. American Fire Ins. Co.*, 149 N. Y. 382; 52 Am. St. Rep. 733, and note.

**INSURANCE—INCREASE OF RISK—CHANGE OF ENCUMBRANCES.**—A condition, in a policy of insurance, against increase of encumbrances on the insured property, without notice thereof to



the company, is not violated by a change, if not an increase, of encumbrances known to the company at the time the insurance was effected: *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553; 15 Am. St. Rep. 696. Whether a change of any kind is material to the risk depends upon whether it would increase the rate of insurance: Note to *Merriam v. Middlesex etc. Ins. Co.*, 32 Am. Dec. 254; *Rife v. Lebanon Mut. Ins. Co.*, 115 Pa. St. 530; 2 Am. St. Rep. 580; and is a question of fact for the jury: Note to *Collins v. Merchants' etc. Ins. Co.*, 58 Am. St. Rep. 441.

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## DAY v. BRENTON.

[102 IOWA, 492.]

**MORTGAGES—TRUST DEED—RELEASE BY TRUSTEE—DISCHARGE OF LIEN.**—As between the parties, or persons having notice, a release of a trust deed in the nature of a mortgage, executed by a trustee without authority of the cestui que trust, and without having received payment of the debt secured, does not discharge the mortgage lien.

**MORTGAGES—TRUST DEED—RELEASE BY TRUSTEE—DISCHARGE OF LIEN.**—If a trustee in a deed of trust, given to secure the payment of certain notes, has no authority to release the mortgage except upon the payment of the debt, but does have authority from the cestuis que trust to release it upon payment being made, a satisfaction and acknowledgment of record made by him after maturity of the debt will discharge the mortgage lien and protect a subsequent bona fide purchaser, relying upon the satisfaction, against the cestuis que trust and their assignees, although the mortgage debt has not actually been paid, as the purchaser is not obliged to go beyond the satisfaction piece appearing of record to see that the debt has, in fact, been paid.

**EQUITY—WHICH ONE OF TWO INNOCENT PARTIES MUST SUFFER.**—If one of two innocent parties must suffer, he through whose agency the loss occurred must bear it.

**MORTGAGES—DEED OF TRUST—TRUSTEES' RIGHT TO RELEASE—WHAT DOES NOT AFFECT.**—If land subject to a mortgage is purchased by two joint owners, one of whom assumes the payment of the debt and gives to his co-owner a trust deed as security therefor, with power to release the deed upon payment of the debt, and the trustee afterward sues the grantor in the trust deed for partition and an accounting, the right of the trustee to satisfy the deed of trust cannot be abridged in such suit where the beneficiaries have not been made parties. Hence, a decree in such suit, that the grantor in the trust deed is bound to pay the mortgage, and that, on payment thereof, the clerk of the court shall satisfy the trust deed, does not deprive the trustee of the power to satisfy it; and the pendency of such suit is not notice to one who buys the land, relying upon a satisfaction of record made by the trustee.

**MORTGAGES—FORECLOSURE BY PIECEMEAL—ASSIGNMENT OF CLAIM FOR TAXES—SPLITTING CAUSES OF ACTION.**—It is not permissible to split causes of action and to foreclose a mortgage by piecemeal. Hence, if a mortgage is foreclosed by a loan and trust company, and the plaintiff does not ask to recover certain taxes paid by it on the property, under the provisions of the mortgage, it cannot so assign the claim for taxes as to vest in the assignee a right to recover them.

Suit in equity brought by the appellee, John M. Day, against Mary E. Brenton, and others, to foreclose a deed of trust in the nature of a mortgage, made and executed by Pat Kenney and wife to Peter A. Johnson, on certain lands in Dallas County. The defendants, who were the widow and heirs at law of W. H. Brenton, deceased, claimed that the decedent was a purchaser of the premises for value, and without notice. They also claimed that, at the time he purchased, the deed of trust was apparently satisfied and released of record by Peter A. Johnson, the trustee named therein. There was a decree for the plaintiff and the defendants appealed.

White & Clarke, for the appellants.

Dudley & Coffin, for the appellee.

<sup>484</sup> DEEMER, J. The deed of trust in suit conveyed the property to Peter A. Johnson, of Polk county, subject to these conditions: "That if the said Patrick Kenney, his heirs, executors, or administrators, shall pay or cause to be paid to the Iowa Loan and Trust Company, their executors, administrators, or assigns, the sum of one thousand dollars, on or before the first day of November, 1886, and to James Lamb three hundred and eighty-six dollars and sixty-one cents on or before the twenty-first day of March, 1884, and sixty-three dollars and thirty-four cents accrued interest, and taxes for 1882, with interest thereon according to the tenor and effect of the promissory notes given to said Iowa Loan and Trust Company, given with the mortgage by James Lamb, and assumed by Johnson and Kenney, and to be paid by P. Kenney, as shown on said notes, then these presents to be void; otherwise to remain in full force." Appellee claims to be the owner, by indorsement, of the note referred to in these conditions, as payable to James Lamb; and this suit is for judgment on that note, and to foreclose the deed of trust. After the execution of the deed of trust, and on or about the thirteenth day of November, 1886, Peter A. Johnson, the grantee named therein, made a satisfaction piece, acknowledging that the same was "redeemed, paid off, satisfied, and discharged in full." This satisfaction was duly filed for record with the recorder of Dallas county. Johnson had no authority, express or implied, from appellee, who then held the Lamb note, to enter this satisfaction of record. Thereafter W. H. Brenton purchased the property, relying upon the <sup>485</sup> recorded satisfaction of the mortgage, and believing that the Lamb note had been paid. Appellee contends that the deceased was not justified in relying upon the sat-

isfaction for two reasons: 1. Because the authority of the trustee was expressly limited to an actual payment of the debts by Kenney to the person or persons who held the notes described in the instrument; and 2. Because of a decree entered of record in a suit wherein Peter A. Johnson, by his next friend, was plaintiff, and Pat Kenney was defendant, wherein it was determined that as between them, Kenney was bound to pay the notes secured by the deed of trust, and further decree "that upon the release of said mortgage to the Iowa Loan and Trust Company, and the payment of said note to James Lamb, or the release of the surety now on said note, that the clerk of this court enter satisfaction of the mortgage made by Pat Kenney and Mary Kenney to Peter A. Johnson, dated March 21, 1883."

To properly solve the question presented, a further statement of the facts is necessary. It appears from the record that Lamb sold the land covered by the mortgage to G. I. Johnson, the father of Peter A. Johnson, and the father in law of Pat Kenney. At the time of the sale, the Iowa Loan and Trust Company held an unsatisfied mortgage upon the property. Johnson, the father, agreed to pay Lamb fourteen hundred and fifty dollars; one thousand dollars of which was covered by an assumption and agreement to pay the Iowa Loan and Trust Company mortgage, and the remainder to be paid to Lamb. He caused the land to be covered (by Lamb) to his son and son in law, and Kenney agreed to pay the consideration to Lamb. Kenney thereupon executed his note to Lamb for the amount stated in the deed of trust, and G. I. Johnson signed the same as surety. He also assumed and agreed to pay the mortgage to the Iowa Loan and <sup>486</sup> Trust Company, and at or near the same time, and to indemnify G. I. Johnson and Peter A. Johnson, who owned one-half the property covered by the company mortgage, executed the deed of trust in suit. Afterward some controversy arose between Peter A. Johnson and Kenney with reference to their rights in and to the premises, and Johnson brought suit against Kenney for partition, and for an accounting between them. In this suit it was decreed that Peter A. Johnson and Pat Kenney were each the owners of an undivided one-half interest in the land; that Kenney was individually bound to pay the mortgage to the trust company and the note in favor of Lamb; and that the mortgages as between them, were liens upon the land set apart to Kenney, to be first paid therefrom; and further decreed that upon release of said mortgage to the trust company and payment of the note to Lamb, or the release of the



surety on the note, the clerk enter a satisfaction of the mortgage made by Kenney and wife to Peter A. Johnson, being the mortgage or deed of trust in suit. Shortly after the execution of the note to Lamb, and before its maturity, he sold and indorsed it to plaintiff, and sometime thereafter executed a formal assignment, referring to the mortgage in suit. Thereafter the loan and trust company foreclosed its mortgage, and sold the land under execution to Jennie A. Rivers, Rivers sold to Collins, Collins to Hoff, Hoff to Brenton. Neither Collins, Hoff, nor Brenton had any notice of the mortgage in suit, except such as the record imparted, and some of these grantees expressly say that they relied upon the satisfaction appearing of record at the time they purchased. There is some doubt about Lamb's knowledge of the mortgage to Peter A. Johnson until after it was satisfied of record, but as the case turns upon another proposition, we will not attempt a solution of the doubt.

<sup>487</sup> As we view it, the case turns upon the authority or apparent authority of the trustee to satisfy the mortgage or deed of trust. In addition to the conditions to which we have referred this instrument provided: "And it is further agreed that if default shall be made in the payment of said sum of money or any part thereof, principal or interest, or if the taxes assessed on the above-described real estate shall remain unpaid for the space of three months, and after the same are due and payable, then the whole indebtedness shall become due, and the said party of the second part, his heirs or assigns, may proceed by foreclosure or in any other lawful mode to make the amount of said note." It is no doubt true that Peter A. Johnson, the trustee, had no authority to release the deed of trust, except upon payment of the notes secured thereby; and it is conceded that, as between the parties, or persons having notice, a release executed by a trustee without authority of the cestui que trust, and without having received payment of the debt secured, does not discharge the lien: See *Jones on Mortgages*, sec. 957; *Insurance Co. v. Eldredge*, 102 U. S. 545; *Williams v. Jackson*, 107 U. S. 478. The trustee did not have authority, in this case, to release the deed of trust except upon payment of the notes secured thereby, but the question here presented is somewhat broader than that of the express power of the trustee. It relates more nearly to his apparent authority, or rather to the effect of the release upon subsequent purchasers, who bought the land on the faith of the satisfaction piece appearing of record. Appellee concedes that the trustee had authority, upon payment of the notes secured by

the deed of trust, to release the same. Now, if he had this power, will it not be presumed, in the absence of notice to the contrary, that, when he enters satisfaction of the instrument upon the records after the notes secured thereby have matured, the notes are paid, and <sup>488</sup> will not a good-faith purchaser of the land, who buys relying upon this satisfaction, be protected against the claims of assignees of the notes secured by the deed of trust? This is the vital question in the case, and its solution does not depend so much upon the authority of the trustee to receive payment as upon his power over the security and his right or apparent right to discharge the instrument. As it is conceded he had the power, without joining his cestui que trust, to release the mortgage upon payment of the debts secured thereby, it seems to us that, when he does so after the debts mature, subsequent purchasers are justified in assuming that the debts have been paid, and in relying upon the record showing the discharge of the mortgage. The satisfaction made by Johnson, the trustee, was entered of record after the debts matured, and expressly stated that the mortgage or deed of trust was "redeemed, paid off, satisfied, and discharged in full." This is a statement made by one having not only apparent, but real, authority, that the debts have been paid, and that the mortgage is satisfied and released. Must a purchaser go further, and see that the debts were in fact paid?

We are aware that the uniform tenor of authorities is to the effect that a trustee has no powers, except those conferred by the instrument creating the trust, and that those given are strictly construed; and we do not overlook the fact that persons dealing with the subject of the trust must take notice of the extent and limitations of the powers conferred; and we do not desire to intrench upon these well-established and salutary rules. But the question here presented cannot be solved by reference to these rules alone. Here is a case where the trustee has the undoubted authority to discharge the deed upon payment of the debt secured thereby. His appointment is accepted by the cestui que trust, and <sup>489</sup> they say to the world that, upon compliance with certain conditions, he has authority to release the instrument. He does release it, and subsequent purchasers buy, relying upon this satisfaction. Who is to suffer under such circumstances—the one who puts it in the power of the trustee to make the discharge, or the one who buys on the faith of the deed of trust being satisfied? Application of certain well-known equitable principles will settle this question. Some of these

rules have been thus stated: "Where one of two innocent parties must suffer, he through whose agency the loss occurred must bear it." Again: "Where somebody must be loser by reason of a deceit practiced, he who employs and puts trust and confidence in the deceiver should be the loser, rather than the stranger." Again, it has been said: "Where loss is caused by the fraud of a third person, such loss should fall on the one whose act enabled such fraud to be committed." In applying these maxims, we have said that where a mortgagee in a mortgage given to secure a certain promissory note negotiates the note to a third person, and then enters a satisfaction of record, such entry will protect a subsequent bona fide purchaser of the land from the mortgagor if he had no notice at the time of such purchase that the note was unpaid, or the entry of satisfaction unauthorized: *Cornog v. Fuller*, 30 Iowa, 212. In another case involving the same question, *Bank v. Anderson*, 14 Iowa, 544, 83 Am. Dec. 390, we said that parties should not be permitted to leave their rights and interests in liens and real estate in such a condition as to injure those who are deceived by appearances, without a record notice to guide them. The appellee in this case has no greater or other rights than Lamb, from whom he purchased the note, for he did nothing to indicate that he had any interest in the security. Appellee relies upon the cases of *Weldon v. Tollman*, 15 C. C. A. 138 (67 Fed. Rep. 986), and *Livermore v. Maxwell*, 87 Iowa, 705. These cases are much <sup>490</sup> alike in their facts, and differ from this in many important particulars. In the *Weldon* case the release was by quitclaim deed, and did not purport to be a satisfaction of the deed of trust in execution of the powers conferred upon the trustee. And in both cases it appeared that the release was given before the maturity of the notes secured by the trust deed, and in neither were the notes surrendered to the makers. Moreover, it is expressly held in the *Livermore* case that a subsequent purchaser who in good faith relied upon a satisfaction entered of record by the cestui que trust, as well as the trustee, would be protected, although at the time the satisfaction was entered the cestui que trust had disposed of the notes secured by the deed. The uniform course of decisions in this state has been to discourage secret liens, and to protect those who invest their money in reliance upon the integrity of the county records: See *Jenks v. Shaw*, 99 Iowa, 604; 61 Am. St. Rep. 256, and cases cited.

Some conflict will be found in the authorities bearing upon the questions here considered, but we think the case turns on the



application of a few well-defined equitable principles, and that the result reached is in accord with these maxims: See, as sustaining our conclusions, *Field v. Schieffelin*, 7 Johns. Ch. 150; 11 Am. Dec. 441; *Ahern v. Freeman*, 46 Minn. 156; 24 Am. St. Rep. 206; *Kuen v. Upmier*, 98 Iowa, 393; *Merrill v. Luce*, 6 S. D. 354; 55 Am. St. Rep. 844; *Whipple v. Fowler*, 41 Neb. 675; *Jones v. Clark*, 25 Gratt. 656; *Carter v. Manufacturers' Nat. Bank*, 36 Am. Rep. 341.

The decree upon which appellee relies as notice to appellants' ancestor, that Johnson had no authority to release the mortgage, being the one entered in the partition and accounting case of Johnson against Kenney, did not take away from Peter A. Johnson his trusteeship; nor did it in any manner abridge or destroy his right to release the trust deed. <sup>491</sup> If it purported to do so, it would be ineffectual, for the reason that neither of the cestuis que trust was made a party to the proceeding, and the district court could not discharge their trustee, and place the clerk of the courts in his stead, without authority from the beneficiaries, or an adjudication in a case to which they were parties. If we treat the suit as *lis pendens*, it does not aid the appellee, for the reasons stated.

Some question is made regarding certain taxes allowed to appellee, and included in the judgment. As these taxes were all recovered under stipulations contained in the deed of trust in suits and the provisions of the loan and trust company mortgage, we need only consider those paid by the trust company, claim for which was assigned to appellee, as the deed of trust to Johnson was satisfied in so far as these defendants are concerned. Appellee is not entitled to recover for taxes paid by the loan and trust company for two reasons: 1. They foreclosed their mortgage in an independent suit, and did not ask to recover for taxes paid. Having failed to do so, they cannot assign a claim therefor, and vest in their assignee a right to recover, for this would allow them to split their cause of action and foreclose by piecemeal: 2. Appellee did not ask to recover these taxes under the loan and trust company mortgage, but under the one to Johnson, as trustee; and this, as we have seen, was satisfied of record.

Appellants filed a cross-petition, in which they asked that the deed of trust be decreed to be no lien upon their real estate, and that the same be declared fully canceled and satisfied of record. This relief should have been granted. The decree of the district court is reversed, and the cause remanded for further proceedings in harmony with this opinion.

**MORTGAGES—DEEDS OF TRUST—SATISFACTION—DISCHARGE OF LIEN WHERE DEBT IS NOT PAID.**—A mortgage is discharged only by payment or release: *Bunker v. Barron*, 79 Me. 62; 1 Am. St. Rep. 282; *Ladd v. Wiggin*, 35 N. H. 421; 69 Am. Dec. 551; *Smith v. Stanley*, 37 Me. 11; 58 Am. Dec. 771; *Kern v. Hotaling*, 27 Or. 205; 50 Am. St. Rep. 710. It has been held that payment of a mortgage to one having apparent authority to receive it, will be treated as if actual authority existed: *Crane v. Gruenewald*, 120 N. Y. 274; 17 Am. St. Rep. 643. But, in the same state, it has been held that a release or conveyance by a trustee in contravention of his trust is void. Thus, a release by a mortgagee of a mortgage which he holds in trust for another, before it becomes due, is in contravention of his trust, and constitutes no obstacle to enforcing such mortgage against subsequent bona fide purchasers, as they are bound to know that he had no authority to grant such release: *McPherson v. Rollins*, 107 N. Y. 316; 1 Am. St. Rep. 826. In this case, the mortgagee, upon the mortgagor's request, entered satisfaction of the mortgage of record, without, in fact, receiving anything in payment. In general, the cancellation of a mortgage and discharge of record is an absolute bar and discharge of the mortgage: See note to *Young v. Shaner*, 5 Am. St. Rep. 703. A deed of trust is but a species of mortgage, and is included within the statute prescribing the entering of satisfaction of mortgages: *Wolfe v. Dowell*, 13 Smedes & M. 103; 51 Am. Dec. 147; note to *Merrill v. Hurley*, 55 Am. St. Rep. 869.

**EQUITY—WHICH ONE OF TWO INNOCENT PARTIES MUST SUFFER.**—When one of two innocent persons must suffer, he whose fault, neglect, or accident has caused the loss must bear it: *Caldwell v. Neil*, 21 La. Ann. 342; 99 Am. Dec. 738; *Beach v. Schoff*, 28 Pa. St. 195; 70 Am. Dec. 122; *McCoy v. Morrow*, 18 Ill. 519; 68 Am. Dec. 578; *Ridgway's Appeal*, 15 Pa. St. 177; 53 Am. Dec. 586.

**ACTIONS—SPLITTING CAUSE.**—A single cause of action cannot be split into two or more suits. If the plaintiff does this, and recovers part of his demand, it is a waiver of and bar to the residue of his claim: *Liddell v. Chidester*, 84 Ala. 508; 5 Am. St. Rep. 387; notes to *Bendernagle v. Cocks*, 32 Am. Dec. 454; *Guernsey v. Carver*, 24 Am. Dec. 61.

**As to when Beneficiaries are Bound by Acts of Trustees in Contravention of Their Trusts.\***

The previous notes in the series, cited below, while throwing some light upon the questions herein to be considered, and being therefore of value in this connection, do not give direct attention to the subject of this note. The most valuable of these is that to *Tyler v. Herring*, 19 Am. St. Rep. 266-297, on sales and conveyances by trustees. Herein it will be necessary to notice the general rules of construction which have been applied to trusts, and trustees' powers. The cases in which trustees, by acts in contravention of their trusts, will be held to bind beneficiaries thereof, group themselves under a few heads, and these heads are naturally divided into two classes. In general, acts of a trustee in contravention of his trust, if binding upon the beneficiaries, are held so either because the acts themselves create equities superior to those of the beneficiaries or because the

\* REFERENCE TO MONOGRAPHIC NOTES.

Losses of trust property for which trustees are not liable: 75 Am. Dec. 799; 40 Am. Dec. 506-518.

Sales and conveyances by trustees: 19 Am. St. Rep. 266-297.

Right to pursue and recover trust funds: 32 Am. St. Rep. 125-130.

Right to follow trust funds: 46 Am. St. Rep. 608-610.

beneficiaries by their own conduct have lost their right, on principles of estoppel or otherwise, to question the validity of such acts. In discussing these cases it will be necessary to consider the equities of third parties to which the trustee's acts give rise. Who are bona fide purchasers for value without notice? What constitutes notice, actual or constructive, of a trust? Again, a cestui que trust may, by his own representations or conduct, by acquiescence, formal confirmation, or release, or by laches, lose the right to attack invalid acts of his trustee. So it must be determined what is laches. When will an estoppel arise? What is acquiescence, confirmation, participation, or release?

*Trustee's Powers, Construction of.*—Powers conferred upon a trustee will, in all cases, be strictly construed, but with a view to carry out the intention of the parties as expressed in the instrument creating the trust. He has no power to alter or vary these powers, as to sell on credit when his power is to sell for cash upon a designated default: *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 270; although, if necessary to accomplish the intention of the parties, he may, by implication, be vested with powers not expressly conferred upon him by the trust instrument. Acts in relation to the trust property, not justified by implication, and in excess or variance of the powers expressly conferred upon him, are in contravention of his trust and void: *Briggs v. Davis*, 20 N. Y. 15; 75 Am. Dec. 363. There is a rebuttable presumption in the case of an exercise of power by a trustee that he has performed those acts in pais which were conditions precedent thereto: *Tyler v. Herring*, 67 Miss. 169; 19 Am. St. Rep. 263; *Graham v. Fitts*, 53 Miss. 307. But persons dealing with a trustee must take notice of the scope of his authority: *Kirsch v. Tozler*, 143 N. Y. 390; 42 Am. St. Rep. 729. The rule of caveat emptor applies to trustee's sales and the purchaser, whether he be the mortgagee or a stranger, is conclusively charged with notice of irregularities by the trustee in executing the power of sale: *Stephens v. Clay*, 17 Colo. 489; 31 Am. St. Rep. 328. To administrator's sales the rule is applied with the utmost rigor and strictness: *Lindsay v. Cooper*, 94 Ala. 170; 33 Am. St. Rep. 105.

*Rights of Those Dealing with Trustees.*—When a trust is created, the legal title to the trust estate vests in the trustee, and the equitable title in the cestui que trust, and, in general, no act of the trustee will be allowed to divest the beneficiary of his equitable estate. This rule applies, however, to cases in which those dealing with the trustee are in fact, or, by virtue of circumstances, occupy the position of, purchasers with notice of the trust. These persons, in many cases, have no knowledge or means of knowledge of the trust, or of the fact that the trustee in dealing with them acts in contravention of his trust. In such a case a purchaser from a trustee takes the legal title by virtue of his conveyance, and since his equity is superior to that of the cestui que trust, he takes the equitable title also. The case of a trust deed such as was considered in the principal case, is in a respect peculiar, because the beneficiary therein has a part in selecting the trustee and may be held liable for negligence in choosing an improper person, while in an ordinary trust, no



such power of choice being given, a similar liability does not arise, and conflicts of rights arising are determined more especially by reference to the position of the purchaser. A purchaser from a trustee with notice takes the property impressed with the trust, and his position is in no respect better than that of his vendor. He is chargeable with the execution of the trust: Monographic note to *Tyler v. Herring*, 19 Am. St. Rep. 267; Am. & Eng. Ency. of Law, 27, 252; *Perry on Trusts*, 4th ed., sec. 828. The rule is settled by an endless and unbroken line of authorities that a bona fide purchaser from a trustee for valuable consideration and without notice, takes the property discharged of the trust, and is vested with both the legal and equitable title thereto: *Perry on Trusts*, 4th ed., sec. 828; Am. & Eng. Ency. of Law, 27, 254; monographic note to *Tyler v. Herring*, 19 Am. St. Rep. 266.

*Applications of the Rule—Volunteers.*—Before taking up a consideration of the holdings of the cases as to who are entitled to protection under the rule stated, and as to what amounts to notice, we will notice a few interesting applications of the rule. "If an estate be passed by a trustee to a stranger by conveyance, then the grantee, if he be a volunteer, will be bound by the trust, whether he had notice of it or not; for though he had no actual notice of the equity, yet the court will presume it against him where he paid no consideration": *Coble v. Nonemaker*, 78 Pa. St. 501. A donee of a trust fund, with or without notice, is charged with the trust. This has been settled since the time of uses: *Otis v. Otis*, 167 Mass. 245. Such a person has no equity superior to that of a purchaser with notice: *McLeod v. First Nat. Bank*, 42 Miss. 99; *Perry on Trusts*, sec. 828; and acquires none by payment of a merely nominal consideration: *Everett v. Texas etc. Ry. Co.*, 67 Tex. 430. Where one holding cattle in trust as mortgagor, used some of them to purchase improvements upon certain land which he then conveyed to his wife, she, being a transferee without consideration, was held to be a trustee: *McClellan v. Pyeatt*, 66 Fed. Rep. 843. To give one the character of a bona fide purchaser for value without notice, before receiving notice, he must have wholly or partially, paid the consideration: *Paul v. Fulton*, 25 Mo. 156. A purchaser from a trustee without notice of the trust, where the sole consideration is the payment of a pre-existing debt, takes the property subject to the trust: *Black v. Caviness*, 2 Tex. Civ. App. 118; *McKamey v. Thorp*, 61 Tex. 652.

*Remote Purchasers.*—A second purchaser without notice from a first purchaser with notice, will be protected: *Jones v. Hudson*, 23 S. C. 494. He is protected both at law and equity, against a secret trust: *Prevo v. Walters*, 5 Ill. 36; *Wilson v. South Park Commrs.* 70 Ill. 46; *Gunnell v. Cockerill*, 79 Ill. 79. So with a purchaser with notice from one without notice is protected, because to hold otherwise would be to deprive the first purchaser of an essential element of his property rights, the power to dispose of his property: *Brown v. Wood*, 6 Rich. Eq. 176; *Bracken v. Miller*, 4 Watts & S. 102. But if the original violator of the trust repossesses himself of an estate thus conveyed, the original equity will reattach to it in his hands: 1

Story's Equity Jurisprudence, sec. 410. And where a trustee of land conveyed to him by a husband and wife in trust for the wife, by connivance with the husband, conveys it to an innocent purchaser for value without notice, and the husband subsequently buys the land from such purchaser, he holds it subject to the original trust: *Church v. Church*, 25 Pa. St. 278. A purchaser with notice from another also with notice, takes no better title than his vendor, but holds as trustee: *Randolph v. East Birmingham Land Co.*, 104 Ala. 355; 53 Am. St. Rep. 64.

*What Constitutes Notice of a Trust.*—In many cases it is extremely difficult to determine what circumstances will amount to constructive notice. Said the vice-chancellor in *Jones v. Smith*, 1 Hare, 43: "If there is no fraudulent turning away from a knowledge of the facts which the *res gestae* would suggest to a prudent mind; if mere want of caution as distinguished from fraudulent and willful blindness, is all that can be imputed to the purchaser—then the doctrine of constructive notice will not apply; then the purchaser will, in equity, be considered as in fact he is, a bona fide purchaser without notice." But however difficult may be their application in some cases, the general rules regarding notice are well settled: *Kirsch v. Tozier*, 143 N. Y. 390; 42 Am. St. Rep. 729; *Trinidad v. Milwaukee etc. Refining Co.*, 63 Fed. Rep. 883; monographic note to *Lodge v. Simonton*, 23 Am. Dec. 47-53. Purchasers from a trustee, under an express trust, are charged with constructive notice of the scope of his powers. Actual knowledge of the existence and terms of a trust is not necessary to charge one with notice thereof in dealing with a trustee. Sufficient notice to arouse his distrust or put him on inquiry may be sufficient: *Bunting v. Ricks*, 2 Dev. & B. 130; 32 Am. Dec. 699. To bind one with notice of a secret trust his knowledge must be full and precise: *Conner v. Tuck*, 11 Ala. 794. The purchaser of land in the possession of a cestui que trust will be presumed to purchase with notice of the trust: *Pritchard v. Brown*, 4 N. H. 397; 17 Am. Dec. 431. It has been held that such possession is not notice of a secret trust in the land so occupied: *Scott v. Gallagher*, 14 Serg. & R. 333; 16 Am. Dec. 508, and later cases in Pennsylvania and elsewhere have followed the holding, but we believe it to be contrary to reason and the recognized rules regarding notice. To allow a purchaser of land to disregard the fact that it is in the possession of a person other than his vendor, a fact which certainly, if unexplained, is not consistent with the legal effect of his vendor's title, and to take title freed of a trust which proper inquiry regarding such possession, would have disclosed, seems inconsistent with the rules of notice: See *Williams v. Brown*, 15 N. Y. 355. The mere fact that a wife lives with her husband upon land which he holds in trust for her is not notice of such trust to a purchaser from him: *Paulus v. Latta*, 93 Ind. 34.

"Though the defense of bona fide purchaser is an affirmative defense, and must be pleaded and proved by the defendant, proof of payment of the consideration is *prima facie* evidence of the want of notice, and devolves upon the complainant the burden of establishing the notice": *Atkinson v. Greaves*, 70 Miss. 45. Transferees

of warrants or notes which show upon their face that they are trust property take, with notice: *Payne v. First Nat. Bank*, 43 Mo. App. 377; *McLeod v. First Nat. Bank*, 42 Miss. 99. The word "trustee" upon the face of stock certificates is notice to purchasers or pledgees thereof: *Shaw v. Spencer*, 100 Mass. 382; 97 Am. Dec. 107; *First Nat. Bank v. National Broadway Bank*, 22 App. Div. (N. Y.) 24. Any reference to the trusteeship or guardianship of a person is notice thereof to persons dealing with him: *Bancroft v. Consen*, 13 Allen, 50; *Fisher v. Brown*, 104 Mass. 259; 6 Am. Rep. 235. The pledgee, after maturity, of negotiable paper secured by a trust deed, the pledge being for the private debt of the trustee, is charged with notice of the trust: *Turner v. Hoyle*, 95 Mo. 337. A village treasurer keeping his official account at a bank, borrowed a large sum from the bank on his own note with his own securities as collateral, professing that the money was to be used for the payment of village warrants. The amount was credited to his official account, and was paid out upon village warrants. Later when the tax money came in he drew a check upon his account to satisfy the note and redeem the collaterals. The treasurer proved a defaulter and the village, as cestui under the trust relation, endeavored to have the bank declared a trustee to the amount of the note. The prayer was denied and the court, per Dickey, J., said, "To charge a stranger to a trust fund as trustee by reason of participation in a misapplication of the fund, upon the ground that the fund was used in payment of a private debt of the original trustee, it is necessary to show, not only that the party sought to be charged was aware that the fund was a trust fund, but also that he was aware that the debt to the payment of which it was applied, was, at the time of such application, in fact a private debt—a debt of such character that the fund in question could not lawfully be applied in payment thereof": *Fifth Nat. Bank v. Hyde Park*, 101 Ill. 595; 40 Am. Rep. 218. See, also, *Goodwin v. American Nat. Bank*, 48 Conn. 550. The depository of a trust fund will not be liable to the beneficiaries thereof where he had no notice of the trust until the fund had been withdrawn by the trustee: *Tenny v. Porter*, 61 Ark. 329. Where one acting through an agent deals with a trustee, notice to the agent of the trustee's character is notice to his principal: *Stewart v. Greenfield*, 16 Lea, 13; and he will be charged with the trust: *Indiana etc. R. R. Co. v. Swannell*, 157 Ill. 616; *Insurance Co. v. Eldredge*, 102 U. S. 545.

*Purchaser's Reliance upon Records.*—In general, one purchasing land in reliance upon the title thereto revealed by a proper examination of public records, is protected against secret trusts of which he has no notice. He is justified in relying upon the records as they were at the time of his purchase: *Gibbons v. Hoag*, 95 Ill. 45; and where they show that trust property has been reconveyed by the trustee to the original holder and the trust terminated, a purchaser of the property is not required to look beyond the records to see if there has been a subsequent unauthorized conveyance by the trustee: *Porter v. McNabney*, 77 Ill. 235; *Livermore v. Maxwell*, 87 Iowa, 705. To charge one as trustee who purchases trust property, it is necessary that a reasonable and seasonable examination of the records



would have given him knowledge of the trust, its extent and provisions: *Grafflin v. Robb*, 84 Md. 451. See *Union Pac. Ry. Co. v. McAlpine*, 129 U. S. 305. One is protected against the cestui in a trust deed, when he is induced to purchase the land covered thereby, by a release entered of record by the person having apparent authority to do so: *Livermore v. Maxwell*, 87 Iowa, 705; *Bank v. Anderson*, 14 Iowa, 544; 83 Am. Dec. 390. Such a release is prima facie valid, and the mere fact that the debt secured thereby is unpaid, does not raise a presumption of fraud, accident, or mistake: *Battenhausen v. Bullock*, 8 Ill. App. 312; *Cornog v. Fuller*, 30 Iowa, 212. Unless given authority to do so, the trustee in a trust deed may not receive payment of the debt before it is due: *Livermore v. Maxwell*, 87 Iowa, 705; and where the record which shows a release of a mortgage by the mortgagee, also shows that the debt secured thereby has not yet matured, a purchaser is held to have notice of the existing trust and is charged with it: *McPherson v. Rollins*, 107 N. Y. 316; 1 Am. St. Rep. 826; *Kirsch v. Tozier*, 143 N. Y. 390; 42 Am. St. Rep. 729. A release of a trust deed by the trustee without payment and without authority from the cestui is void: *Lakeman v. Robards*, 9 Mo. App. 179; and one purchasing with notice takes of course, as trustee: *Insurance Co. v. Eldredge*, 102 U. S. 545. But where a release, though executed before the notes secured by a trust deed were due, was executed by the trustee and certified to by the original holder of the notes, one who in reliance upon such release, and after the exercise of reasonable caution and inquiry, loans money which is secured by a trust deed of the same lands covered in the first deed, has equities superior to those of assignees before maturity of the notes secured by the first deed, though the release was executed subsequent to the assignment: *Williams v. Jackson*, 107 U. S. 478. Justice Gray in delivering the opinion in that case said: "Williams took every reasonable precaution that could have been expected of a prudent man before advancing his money to Charles T. Davis for Sweet and wife. He declined to lend his money until after he had been furnished with a conveyancer's abstract of title, showing that the deed of release from the trustees under the first deed of trust, and from the original holder of the notes secured thereby, as well as the second deed of trust to secure the repayment of the money lent by Williams, had been recorded, and that the land was not subject to any encumbrance prior to the second deed of trust. It was suggested in argument that as the first deed of trust showed that the notes secured thereby were negotiable and were not yet payable, and that the land was not intended to be released from this trust until all the notes were paid, Williams was negligent in not making further inquiry into the fact whether they were still unpaid. But of whom should he have made inquiry? The trustees under the first deed and the original holder of the notes secured thereby having expressly asserted under their own hands and seals that the notes had been paid, and Sweet and wife having apparently concurred in the assertion by accepting the deed of release and putting it on record, he certainly was not bound to inquire of any of them as to the truth of the fact; and there was no other per-

son to whom he could apply for information, for he did not know that the notes had ever been negotiated, and he had no reason to suppose that they had not been cancelled and destroyed. To charge Williams with constructive notice of the fact that the notes had not been paid in the absence of any proof of knowledge, fraud, or gross or willful negligence on his part, would be inconsistent with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business." The case of *Abell v. Brown*, 55 Md. 218, is interesting, but the facts were too complex for recital here. In it there was an unauthorized release of a mortgage as to part of the premises mortgaged, executed and recorded by the trustee of the estate of which the loan secured by the mortgage was a part. The question arose from an attempt by the trustee's successors, to impress the original trust upon the released premises in the hands of a purchaser to whose hands they had come by mesne conveyances. The purchaser defended upon his reliance upon the records, in which it appeared that the release was by the trustee. In granting the relief prayed for, it was held that the record reference to the trust put the purchaser upon inquiry as to the terms of the trust, and charged him with notice of what such inquiry would have revealed, namely, that the release was in contravention of the trust and without the order or sanction of the superior court, a reference to the records of which was incumbent upon the purchaser: See *Leake v. Watson*, 58 Conn. 332; 18 Am. St. Rep. 270. A purchaser of chattels in one state from one having apparent complete ownership, is not charged as trustee by the registration in another state of a trust deed thereto, or which he had no actual notice: *Wyse v. Dandridge*, 35 Miss. 672; 72 Am. Dec. 149.

*Reliance upon the Face of a Trust Deed* or instrument of trust by a purchaser from the trustee, is sufficient to protect him, where the sale is made in strict conformity with the directions of the instrument. Where a trustee's deed recites a compliance with all the requirements necessary to a valid sale, an innocent purchaser need not go behind the face of the deed to ascertain if its recitals are correct: *Wilson v. South Park Commrs.*, 70 Ill. 46. See *Field v. Schiefelin*, 7 Johns. Ch. 150; 11 Am. Dec. 441. Thus a purchaser is not required to examine into a trustee's accounts to see if his sale is necessary: *Thompson v. McKay*, 41 Cal. 221. And where a sale was conducted jointly by a trustee in a trust deed and the trustor's assignee in bankruptcy, a purchaser was justified in relying upon the recitals in the trust deed, though an inspection of the assignee's schedule would have given him notice of a defect in the title: *Atkinson v. Greaves*, 70 Miss. 42. But notice actual or constructive of irregularities in the sale binds the purchaser: *Harris v. Smith*, 98 Tenn. 286; *Smith v. Burgess*, 133 Mass. 511. And where an executor has no power to sell, a purchaser at his sale acquires no title: *Williamson v. Williamson*, 3 Smedes & M. 715; 41 Am. Dec. 636; *Chicago etc. R. R. Co. v. Kennedy*, 70 Ill. 350; *Gunnell v. Cockerill*, 79 Ill. 79. The payment of the debt secured by a trust deed terminates the power of sale conferred thereby: *Penny v. Cook*, 19 Iowa, 538, and the same effect has been given a tender of the debt: *Welch*

v. Greenalge, 2 Helsk. 209, though in neither of these cases were the rights of innocent purchasers brought in question.

*Conferring Indicia of Title upon Trustee—When Binds Cestui que Trust.*—Following the rule that where one of two innocent persons must suffer, he must suffer who placed the party doing the wrong in a position to do it, beneficiaries have frequently, as in the principal case, been held bound by unauthorized acts of trustees, because by clothing the trustees with indicia of title or power, they have enabled them to deceive innocent purchasers. Such cases usually arise over trust deeds. "In such cases," said Walker, J., in *Wilson v. South Park Commrs.*, 70 Ill. 46, "the person executing the trust deed, selects his trustee, and usually conveys to a person in whom he reposes confidence, both as to his integrity and business capacity, and having reposed the confidence, and conferred the power on him to act, if it is abused, he must be held responsible for the improper selection. Even where he authorizes the assignee to execute the power he must be equally responsible, as he confers the power, and if improvidently done, the innocent must not suffer for his want of prudence, unless they can be charged with notice of the abuse of the power": See *Roy v. McPherson*, 11 Neb. 197. Thus, where the beneficiary in a trust deed fails to have it acknowledged and recorded, he has no rights as against an innocent purchaser of the property, for value and without notice: *Whittle v. Vanderbilt Min. etc. Co.*, 83 Fed. Rep. 48. So, transferees of corporate stock from one upon whom the real owners thereof have conferred the apparent right of property, will be protected against a secret trust of which they have no notice: *Crocker v. Crocker*, 31 N. Y. 507; 88 Am. Dec. 291. Under similar circumstances purchasers of overdue negotiable paper or non-negotiable paper are given similar protection: *Neuhoff v. O'Reilly*, 93 Mo. 164; *Lee v. Turner*, 89 Mo. 489. Recording a trust deed, without recording the defeasance, makes the grantee apparent absolute owner, and an innocent purchaser from him takes complete title: 1 *Jones on Mortgages*, 4th ed., secs. 548, 549. So, the failure of a mortgagor to have the discharge of the mortgage properly recorded may lose him his property in a similar manner and for like reason: *Bausman v. Eads*, 46 Minn. 148; 24 Am. St. Rep. 201.

*Beneficiary's Right of Election.*—When a trustee commits a breach of his trust by selling the trust property, the cestui que trust may elect to hold him responsible personally, or to proceed to impress the trust upon the property in the hands of the purchaser. The latter course is ineffectual, we have seen, if the purchaser be bona fide, for value and without notice. In general it is ineffectual if the property is incapable of being traced or distinguished. But the right of election exists: *Vance v. Kirk*, 29 W. Va. 344; *Parker v. Straat*, 39 Mo. App. 616; *Isom v. First Nat. Bank*, 52 Miss. 902; *Indiana etc. R. R. Co. v. Swannell*, 157 Ill. 616. This right is alternative however: 2 *Perry on Trusts*, sec. 828; *Indiana etc. R. R. Co. v. Swannell*, 157 Ill. 616; and is governed by the ordinary rules regarding election between remedies. The cestui que trust cannot occupy contradictory positions. He cannot retain the proceedings of the sale and, at the same time, follow, and recover the property itself: *Bonner v. Hol-*



land, 68 Ga. 718; although it has been held that while accepting such proceeds he might make a valid reservation of his right to contest: *Boerum v. Schenk*, 41 N. Y. 182; and by protracted litigation on his part, attacking a purchase by his trustee, he may be estopped to claim that it was made for his benefit: *Wiswall v. Stewart*, 32 Ala. 433; 70 Am. Dec. 549.

*Laches*.—This right of election must be exercised within a reasonable time or the cestui will be held guilty of laches and estopped to assert that the act of the trustee in question is invalid or unauthorized: *Hammond v. Hopkins*, 143 U. S. 224; *Wiswall v. Stewart*, 32 Ala. 433; 70 Am. Dec. 549; *Am. & Eng. Ency. of Law*, 27, 269. If he would disaffirm the act he must do so before innocent third parties have invested money and labor upon the faith of its validity, and if he does not do so, he will be barred from setting it aside: *Jenkins v. Pierce*, 98 Ill. 646; *Dean v. Dean*, 9 N. J. Eq. 425. The period of delay necessary to constitute laches in such a case depends largely upon the circumstances of any given case: *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587. A delay of several years for speculative purposes after full knowledge of the invalidity of a transaction is sufficient: *Hoyt v. Latham*, 143 U. S. 553; *Follansbe v. Kilbreth*, 17 Ill. 522; 65 Am. Dec. 691. In holding a delay of five years insufficient, the court, in *Spurlock v. Sproule*, 72 Mo. 503, said: "In cases where a party comes before the court with a clear right entitling him to relief, there being no remedy at law, something more than mere delay must be shown before the relief asked can be refused, such as that the party has slept upon his rights till the property sought to be regained has been enhanced in value by improvements made, or that some other matter has intervened which would give to the party who has thus lain idle, an unconscientious advantage over the other party if the relief asked were granted him." Laches in such case is not a question of time but of circumstances, "and while there are cases of this class where equity has granted relief after a great length of time, even fifty years, yet there are others in which it has refused it after only a few months": *Etting v. Marx*, 4 Fed. Rep. 673. See *Badger v. Badger*, 2 Wall. 87. For various periods which have been considered sufficient delay to constitute laches on the part of a cestui que trust, see *Williams v. First Presbyterian Soc.*, 1 Ohio St. 478; *Hume v. Beale*, 17 Wall. 336; *Connolly v. Hammond*, 51 Tex. 635; *Hammond v. Hopkins*, 143 U. S. 224; *McHaney v. Schenk*, 88 Ill. 357; *Gibson v. Herriott*, 55 Ark. 85; 29 Am. St. Rep. 17; *Hamilton v. Lubukee*, 51 Ill. 415; 99 Am. Dec. 562; *McLaffin v. Jones*, 155 Ill. 539. A cestui que trust cannot be held to have slept upon his rights, until his trustee has assumed some attitude antagonistic to those rights: *Dyer v. Waters*, 46 N. J. Eq. 484.

*Statutes of Limitation*.—Courts of equity are not required to apply statutes of limitation except in cases wherein their jurisdiction is concurrent with that of the law courts. It is a familiar rule that the statute of limitations does not apply to express trusts: *Dyer v. Waters*, 46 N. J. Eq. 484. It begins to run against an express trust from the time it is repudiated: *Talbott v. Barber*, 11 Ind. App. 1; 54 Am. St. Rep. 491; but in equity the statute is not, as such, a good

defense. In such a case the only defense in a court of equity of the United States is laches in the pursuit of the party's remedy: *Lakin v. Sierra Buttes Gold Min. Co.*, 25 Fed. Rep. 337. Under some circumstances a purchaser of trust property from a trustee, as where he pays a valuable consideration, under order from the proper court, with written evidence of title, and has seven years' possession, takes prescriptive title: *Varner v. Gunn*, 61 Ga. 54.

*Estoppel of Beneficiary by Release, Confirmation, or Acquiescence.*—A beneficiary may, by formal release, discharge his trustee from liability for a breach of trust: *Corks v. Barlow*, 5 Redf. 406. To validate such a confirmation or release it must appear that the party confirming labored under no disability, acted deliberately and with complete knowledge of all material circumstances of the transaction: *Luers v. Brunjes*, 5 Redf. 33; *Boyd v. Hawkins*, 2 Dev. Eq. 195. Acquiescence by a cestui que trust in an unauthorized act of the trustee may make it binding upon him and release the trustee; but in order to do so the acquiescence must be complete and free and with full knowledge: *White v. Sherman*, 168 Ill. 589; 61 Am. St. Rep. 132. It must be established by the same measure of proof as is usually required in dealings between a trustee and a cestui que trust: *Zimmerman v. Fraley*, 70 Md. 562. Thus an unauthorized substitution of other property for trust property may be validated by the acquiescence of the cestui que trust: *Brazel v. Fair*, 26 S. C. 370. And beneficiaries of trust property sold under an invalid order of court, who stand by and allow the purchasers to erect valuable improvements thereon, without objection, will be held to have acquiesced in the sale and will be estopped from setting up title thereto: *Iverson v. Saulsbury*, 65 Ga. 724. For similar holdings, see *Storrs v. Flint*, 46 N. Y. Sup. Ct. 598; *North Carolina R. R. Co. v. Drew*, 3 Wood. 691; *Warner v. Blakeman*, 36 Barb. 501; *Dykes v. McVay*, 67 Ga. 502; *Sloan v. Frothingham*, 65 Ala. 593. A purchaser of trust property with notice takes a good title where he buys at the request, and with the consent of the cestui que trust: *Page v. Page*, 8 N. H. 187; but he will not do so in case fraud in the transaction is shown: *Kent v. Plumb*, 57 Ga. 208; or he has notice that a breach of trust is being committed: *Salinas v. Pearsall*, 24 S. C. 179. Thus where a trust was for a wife, free from her husband's debts, and empowered the trustee to sell at the request of the wife, a sale with such consent and for the husband's benefit was held void: *Hart v. Bayliss*, 97 Tenn. 73; and a purchaser with notice at a void executor's sale, cannot plead an estoppel of the heirs by acquiescence: *Huse v. Den*, 85 Cal. 390; 20 Am. St. Rep. 232. Acquiescence in one thing does not validate another: *Rabb v. Flanniken*, 29 S. C. 278; *Salinas v. Pearsall*, 24 S. C. 179. In order that the acquiescence of the cestui que trust may empower a trustee to make a valid sale, there must be no limitations over to children or third persons: *Arrington v. Cherry*, 10 Ga. 429; *First Nat. Bank v. National Broadway Bank*, 22 App. Div. (N. Y.) 24; for it is a general rule that acquiescence of a tenant for life, or by a cestui que trust for life, will not bind the person entitled to the remainder: *White v. Sherman*, 168 Ill. 589; 61 Am. St. Rep. 132; *Zimmerman v. Fraley*, 70 Md. 561; *Ryder v. Sisson*, 7 R. I. 341.

Such assent is effective and justifies the trustee's acts only so far as the interest of the person assenting is concerned: *Ryder v. Sisson*, 7 R. L. 341.

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## SUTHERLAND v. SUTHERLAND.

[102 Iowa, 535.]

**PLEADING—REFERENCE TO COURT FILES.**—For the purpose of abbreviating the record, portions of the court files may, by specific averment, be referred to, and incorporated in, the pleadings; and this practice is unobjectionable where no confusion or other harm results.

**APPEAL—PLEADING—MAKING A WILL PART OF AN ANSWER—REFERENCE WITHOUT EXHIBIT.**—If the defendants in an action rely upon a probated will and, in express terms, make it a part of their answer, and refer to it as a part thereof, they will not be heard, on appeal, to say that the will is not a part of the answer, even if the will is not set out in the answer or as an exhibit thereto.

**DOWER—WHEN WIFE'S ACCEPTANCE OF DEVISE IS NO BAR.**—If a husband devises a life estate to his wife without any express provision in the will that such estate shall be in lieu of dower, her acceptance of the devise does not bar her right to a distributive share of his estate owned by him at the time of his death.

**PLEADING—DEMURRER—ADMISSION OF FACTS.**—An allegation in a pleading that a devise was intended to be in lieu of dower is a mere conclusion, and nothing is admitted by a demurrer where no facts are stated to sustain such conclusion.

**Action for a distributive share of real estate.** The plaintiff, Nancy Sutherland, widow of Donald Sutherland, asked that her share of certain real estate of which her husband died seised be set apart to her. The defendants, Nathaniel Sutherland and others, heirs at law of the deceased, answered that Donald Sutherland died testate; that his will was duly probated; that in it he bequeathed to plaintiff the real estate described in her petition, to have and to use during her natural life, with remainder to the defendants, "in lieu of her dower or statutory rights in said land." They also made the will and other portions of the court files, records, etc., a part of the answer, and referred to them as such. The defendants asked that the prayer of the petition be denied. The plaintiff demurred on two grounds: 1. That the facts of the answer did not entitle the defendants to the relief demanded; 2. That the facts stated in the answer, and the provisions of the will referred to therein and made a part thereof, failed to show that the plaintiff was not entitled to the relief demanded. The demurrer was sustained, and, the defendants electing to stand upon their answer, a default was entered, and



a decree rendered, as prayed for in the petition. The defendants appealed.

Welch & Welch, for the appellants.

F. O. Ellison, for the appellee.

**537** GIVEN, J. 1. Appellants insist that, as the will is not set out in nor as an exhibit to their answer, it should not be considered as a part thereof in passing upon the demurrer. As under the admissions in their answer the only defense they have rests upon the provisions of the will, we do not discern why appellants desire to withhold the will from consideration. In *Wishard v. McNeil*, 78 Iowa, 48, this court said: "It is not uncommon for the pleadings to refer to and incorporate therein portions of the court files by specific averment. Such practice tends to abbreviate the record, and where confusion or other harm does not result we do not think it objectionable. The practice would be subject to control of the court in the exercise of a sound legal discretion." Appellants, as we have seen, in express terms "make the will . . . . a part of this answer and refer to the same as part of this answer." Surely, in the face of this, they should not now be heard to say that the will is not a part of their answer.

2. In *Howard v. Watson*, 76 Iowa, 230, it is said, "The devise to the defendant is an estate for life, and it has been held that a widow 'may take dower, notwithstanding a devise to her in the will, unless there is an express provision in the will to the contrary, and the claim for dower be inconsistent with and will defeat some provision of the will,'" citing *Daugherty v. Daugherty*, 69 Iowa, 677. It also said: "And in *Metter v. Wiley*, 34 Iowa, 214, it was held that the devise of a life estate would not **538** bar the right of a widow to a distributive share of the real estate owned by her husband at his death." The answer shows on its face that the devise is of a life estate, and fails to show that there is an express provision in the will that that estate shall be in lieu of dower. The allegation that it was so intended is the statement of a mere conclusion, and one that is not warranted by what is said as to the devise. We think that the matter stated in the answer itself does not show a defense to plaintiff's cause of action. The provisions in the will are these: "1. It is my will that my wife, Nancy Sutherland, shall have, after my death, the possession and use of my property, real and personal, until her death; 2. After her death the remaining property, real and personal, shall be ap-

praised, and sold and divided among our children in the following portions." Then follow the names and portions of the children. We think it entirely clear, under the cases cited, that the demurrer was properly sustained. The judgment of the district court is therefore affirmed.

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**PLEADING—EXHIBITS—REFERENCE TO DOCUMENTS—ESTOPPEL.**—A PAPER cannot be incorporated in a pleading by reference to it. If it is desirous to show to the court the contents of a paper, this may be done by exhibiting it, or by averring the legal effect of its contents: *Hanover Fire Ins. Co. v. Brown*, 77 Md. 64; 39 Am. St. Rep. 386. Short pleadings, when applicable, are to be encouraged: *Harlan v. Bernie*, 22 Ark. 217; 76 Am. Dec. 428; but, while written evidence may be filed as exhibits, and referred to as part of the pleading, good pleading requires that the substance of such evidence shall be set forth by proper averments: *Harvey v. Kelly*, 41 Miss. 490; 93 Am. Dec. 267.

**APPEAL—ESTOPPEL—ALLEGATION IN PLEADINGS.**—A party is estopped by the allegations in his own pleading: *Knoop v. Kelsey*, 102 Mo. 291; 22 Am. St. Rep. 777; *Lowry v. Erwin*, 6 Rob. (La.) 192; 39 Am. Dec. 556.

**PLEADING—DEMURRER—ADMISSIONS BY.**—A demurrer admits only such facts as are well pleaded. It does not admit conclusions of fact or of law: *McPhail v. People*, 160 Ill. 77; 52 Am. St. Rep. 306, and note; *American Water Works Co. v. State*, 46 Neb. 194; 50 Am. St. Rep. 610, and note.

**DOWER—WILL.**—A widow may take a life estate under her husband's will without defeating her right of dower. She may take in both ways if there is no express provision prohibiting the taking of dower, and such taking is not inconsistent with the will. Hence, her acceptance under the will is no bar to her right of dower: *Hunter v. Hunter*, 95 Iowa, 728; 58 Am. St. Rep. 455, and note.

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## BEECHLEY v. MULVILLE.

[102 Iowa, 602.]

**DEFINITIONS—"COMMODITY"** IS THAT which affords advantage or profit.

**DEFINITIONS—INSURANCE** IS A "COMMODITY" within the meaning of a statute which prohibits any pool, trust, agreement, combination, or confederation with any partnership, corporation, or individual to regulate or fix the price of oil, lumber, coal, grain, flour, provisions, "or any other commodity or article whatever."

**CONSPIRACY TO FIX RATES OF INSURANCE—FORBIDDEN COMBINATIONS.**—A compact between local insurance agents of different cities to fix the rates upon all risks therein, and which imposes certain penalties for the taking of risks at less rates than those fixed by the compact, comes within the prohibition of a statute which forbids the formation of combinations or confederations to regulate or fix the price of any commodity.

**CONSPIRACY AS A SUBJECT OF CIVIL ACTION.**—A conspiracy cannot be made the subject of a civil action, unless something is done which, without the conspiracy, would give the right of action.

**CONSPIRACY—FIXING RATES OF INSURANCE—UNLAWFUL TRANSACTION.**—If local insurance agents form an unlawful combination or compact to regulate and fix rates of insurance, with certain rules, regulations, and penalties, an agent, who is a member of the compact, and who represents companies, not members of it, but which have a right to discharge him at pleasure, cannot, after his violation of the terms of the compact, and the revocation of his agencies, by the compact and companies represented by him, because of his refusal to observe the terms of the combination, recover damages, either from the members of the compact or from such insurance companies, for the loss occasioned to him by such revocation, especially where the agencies came to him as a member of the compact, upon an agreement to do business under its rules; and it makes no difference that the members of the compact and such insurance companies acted together to enforce the rules and regulations of the combination. The transaction, in its entirety, is unlawful.

Action for damages because of a conspiracy to destroy the plaintiff's business as an insurance agent. There was a judgment for the plaintiff and the defendants appealed.

Jamison & Burr and A. R. West, for the appellants.

Smith & Smith and C. J. Deacon, for the appellee.

<sup>603</sup> GRANGER, J. 1. The defendants are, besides John Mulville and Henry Bennett, the Detroit Fire and Marine Insurance Company of Detroit, Michigan, and the Phoenix Insurance Company of Hartford, Connecticut. Charles T. West was named as a defendant, but not served. The plaintiff was an insurance agent at Cedar Rapids, Iowa, and on the fourteenth day of November, 1883, he became a member of the "compact" or organization styled the Cedar Rapids and Marion Underwriters' Union. The agreement is embraced in a writing, denominated "Compact," the first division of which is as follows:

**"Compact.**

**"The Cedar Rapids and Marion Underwriters' Union.**

"We, the undersigned, local agents of Cedar Rapids and Marion, Iowa, agree to enter into the following compact, with Henry Bennett, as manager, who shall be required to give a good and sufficient bond in liquidated damages not to engage in the business of fire insurance as a local agent, directly or indirectly, in Cedar Rapids or Marion, for a period of not less than three years from the date of his vacation of office, the expense of such compact and manager to be paid by the companies on a pro rata basis of receipts. The duties of said manager to be as follows: 1. To fix rates upon all risks in Cedar Rapids and Marion and vicinity of each, which he shall promulgate and furnish to all agents at once; 2. He shall pass upon and approve by



his official stamp (which shall bear no erasures or alterations) all the monthly accounts, abstracts, and daily reports, reports of transfers of location of risks, and indorsements, and mail same to various companies or general agents; also, all policies, renewal receipts, or certificates of insurance on which a return premium is charged to <sup>604</sup> the company, or allowed by the agent; 3. He shall investigate all irregularities which may come under his notice, and have power to examine the books and papers, and take the written statement of any agent, under oath, and enforce such penalties for violation as are hereinafter prescribed in this agreement; and in case of failure or refusal of any agent to pay any penalty assessed under this clause, within ten days, the manager shall have power, and it shall be his duty, to take possession of the books and papers of the company or companies in such agency, providing the manager shall first obtain from such company or companies a written order therefor, and hold the same subject to their order, it being conditioned only that the infliction of a money penalty on an agent or agents shall cover all offenses prior thereto, except that nothing herein shall prevent the manager from peremptorily ordering canceled any policy or policies theretofore issued in violation of this compact and pledge, and prohibiting such agent or agents from writing upon the risk or risks for one year thereafter; and any risk shall be considered as an offense, irrespective of the number of policies issued thereon. Now, therefore, in consideration of the appointment of such manager, we, the undersigned local agents, do hereby agree to and associate ourselves together, under the name of the Cedar Rapids and Marion Underwriters' Union, with the following organization, pledge, and penalties."

The other divisions of the compact are under the headings "Organization," "Pledge," and "Penalties." After some provisions as to organization is the following, as a part of the pledge: "We also agree strictly and honorably to adhere, both in letter and spirit, to the following pledge, viz.: Section 1. That we will not write a risk until a rate has been fixed by the manager, and will adhere to all the rates fixed by him; <sup>605</sup> that we will not issue a policy ourselves or cause insurance to be written by any company at less than said fixed rates; and, in the event of binding an unrated risk, we will submit an application for rating thereon to the manager, upon the same or next succeeding business day to that on which such risk was bound." After other pledges is the subject of penalties, under

which it is provided that an offending member may be required to cancel a policy under which an offense is committed, and shall be prohibited from writing upon the same risk for one year. Then follows a provision for the imposition of fines for a first and second offense, and for the third offense the removal of all companies from the offending member, and expulsion from the compact.

This compact is signed by some thirty-five agents and two insurance companies, not, however, including either of the defendant companies. The defendant Bennett was unanimously accepted as manager, and assumed the duties of the office, December 1, 1883. The plaintiff was one of the signers of the compact. Another compact, consisting of members of the former compact, seems to have been formed July 28, 1884, signed by some nineteen of the agents, including the plaintiff, designed to compete "with noncompact insurance companies," with the same person as manager. The defendant Mulville was special agent for the Detroit Fire and Marine Insurance Company, and West, the defendant named, but not served, was such agent for the other defendant company. Prior to November, 1889, the plaintiff had been the local and soliciting agent of the two defendant companies, and other companies at Cedar Rapids, Iowa, and, by selling insurance at less than the prescribed rate under the compact, a fine had been imposed, and also other penalties as to writing insurance. Plaintiff refused to pay the fine, and insisted upon his right to solicit ~~606~~ insurance where he pleased. It is averred in the petition that, because of this, defendant Bennett and the other defendants confederated together to destroy his business as an insurance agent, and that because of such confederation, the defendant companies, and the others for whom he was acting, canceled their contracts with him, because of which his business was lost, which he claims was worth one thousand dollars per year. The defendants, all except West, answered by a general denial, and the Phoenix Insurance Company pleaded its contract of employment with plaintiff, as in writing, and its right to discharge him at any time it pleased. It also pleaded an estoppel because of plaintiff's membership in the compact.

The jury returned special findings to the effect: 1. That plaintiff was a party to the compact at the time he received his appointment from the defendant companies; 2. That at the time he received the appointment he did not agree to conform to the rules and regulations of the compact; 3. That he did violate the rules of the compact before the agencies were taken

from him; 4. That the agencies were not taken because he refused to comply with the rules of the company as provided in his agreement, but that other reasons existed therefor; 5. That a combination or conspiracy was entered into between the defendant companies and others for the purpose of injuring plaintiff; 6. That plaintiff had no contract with the defendant companies to be their agent, except during their pleasure; 7. That plaintiff was injured, in the taking away of the agencies of the defendant companies, otherwise than in the privilege of soliciting insurance for them in the future as in the past, and the loss of the probable earnings in the way of commissions he might have earned had he been permitted to continue as agent; and 8. That the combination to <sup>607</sup> injure his business was formed after plaintiff's refusal to comply with the regulations of the compact.

As to the second finding, that plaintiff, at the time he received his appointment from the defendant companies, did not agree to conform to the rules and regulations of the compact, nothing more can be intended that it is not so specified in the agreements, which are in writing. If more was intended, it would be without support in the evidence. The fact clearly appears that these agencies were taken while plaintiff was a member of the compact, and observing its regulations, and that these agencies were a part of his business as a member of the compact.

As to the fourth finding, that the agencies were not taken from plaintiff because he refused to comply with the rules of the companies, as provided in his agreement, but for other reasons, the record will only justify the conclusion that the reason for which they were taken is the violation of the rules of the compact. It may be important hereafter to notice other facts.

2. The following is section 5454 of McClain's Code, being section 1, chapter 84, Acts Twenty-second General Assembly: "If any corporation organized under the laws of this state, or any other state or country for transacting or conducting any kind of business in this state, or any partnership or individual shall create, enter into, become a member of or party to any pool, trust, agreement, combination, or confederation with any other corporation, partnership, or individual to regulate or fix the price of oil, lumber, coal, grain, flour, provisions, or any other commodity or article whatever; or shall create, enter into, become a member of or a party to any pool, agreement, combina-



tion, or confederation to fix or limit the amount or quantity of any commodity or article to be manufactured, mined, produced, or sold <sup>608</sup> in this state, they shall be deemed guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in the next section." It is thought by appellants that such statute has no application to insurance companies, but the only reason assigned for it is that the same subject has been before each successive legislature since the act passed, and no one has thought that the act referred to such companies. However that may be, we have no doubt of its application to insurance companies because of the language of the act. There is a manifest purpose to make the section comprehensive as to the subject matter, as well as to persons, both natural and artificial, coming within its prohibitions. It prohibits combinations to fix the price of oil, lumber, coal, grain, flour, provisions, or any other commodity, or article whatever. Insurance is a commodity. "Commodity" is defined to be that which affords advantage or profit. Mr. Anderson, in his Law Dictionary, defines the word as "convenience, privilege, profit, gain; popularly, goods, wares, merchandise." We see no reason why, in the act, the word should be restricted to its popular use. It is common to speak of "selling insurance." It is a term used in insurance business, and law writers have, to quite an extent, adopted it. Again, there are the same reasons why it should be protected against combinations as there are in matters clearly within the provisions of the law. The district court instructed the jury that the combination was prohibited by the act in question, and we think the holding was right.

3. At the close of the evidence, defendants moved the court to direct a verdict for them under the undisputed facts, and we think it should have been done, notwithstanding our holding that the act above referred to applied to insurance companies. In view of our conclusions as to the applicability of the law to insurance companies, and with the statement <sup>609</sup> that we regard the compact in question as clearly within its provisions, we may pass much that is said in argument by appellee, as to the combination and its character. Reliance is placed on the finding of a conspiracy to injure plaintiff, and there is a finding by the jury that a conspiracy was so formed after the refusal of plaintiff to comply with the regulations of the compact. No such a conspiracy as that is pleaded. It is pleaded that a conspiracy was formed in the organization of the compact, and it is then pleaded that, after the violations of the

terms of the compact by plaintiff, these defendants joined together, and assumed to cancel the contracts then existing between plaintiff and the companies of which he was agent, and this is likely what is meant by such conspiracy. With the understanding of what is meant, we need not make nice distinction about the words used. We do not understand it to be contended—and, if it is, the contention is unwarranted—that, after the refusal by plaintiff to comply, there was any combination formed other than that the fines were imposed, and the agencies revoked, because of the refusal to observe the terms of the compact. These were results contemplated by the compact, and the means to that end were such as must have been contemplated when the compact was organized. All that can be said is that the defendants, understandingly, acted together to enforce the rules and penalties of the compact. Any claim that they so acted with a purpose to injure plaintiff, except as injury would necessarily result from the enforcement of the regulations of the compact, is entirely without support in the record. The court said to the jury: “10. If it appears from the evidence that plaintiff’s commissions of appointment from the companies represented by plaintiff provided that they might withdraw their agencies from him at any time without <sup>610</sup> giving any cause therefor, then the plaintiff could not recover damages on account of such withdrawal, unless you further find that such withdrawals were made through and in pursuance of a design to injure the plaintiff, and as a part of a conspiracy among defendants, or among them and others, to wrong plaintiff, or to inflict punishment upon him for refusal to comply with the said unlawful compact or union.” We quote the instruction, because it indicates the mind of the court as to the real basis of recovery, under the evidence. One of the special findings is that the companies had the right to withdraw their agencies at pleasure, and, with that right fixed, the right of recovery is made to depend on the purpose with which the right was exercised; that is, was it done intending to injure the plaintiff? Concede, for the purpose of the case, the rule that such a recovery could be had, and the record will then defeat a recovery. It is not difficult to illustrate the situation. Had the companies, without reference to the compact, revoked the agencies, as they could rightfully do, the injury to plaintiff’s business would have been the same, but without redress. Now change the purpose, so that the revocations are in pursuance of the terms of the compact, and we have precisely this case.

The revocations have now been caused by an unlawful combination. Of this combination plaintiff was a member. The penalties imposed, among which is that of "removal of all companies from the offending members," are specified in the compact, and his name is signed thereto. He is himself one of the conspirators who devised and put in operation that which caused his injury. Bennett was but the agent. He did what the plaintiff and others directed. It can be said, undoubtedly, that plaintiff has caused the injury of which he complains by his unlawful acts. Take from <sup>611</sup> the case, such acts, and the result, of which he complains, could not have happened.

It will be conceded, we think, that, independent of what is termed a "conspiracy," the acts complained of in this case would not afford a right of action, for what is claimed is that the conspiracy or combination caused the acts. Mr. Cooley, in his work on Torts, 2d ed., 143, says: "The general rule is that a conspiracy cannot be made the subject of a civil action unless something is done which without the conspiracy would give the right of action." The rule is approved in *Jayne v. Drorbaugh*, 63 Iowa, 711. See, also, *Kimball v. Harman*, 34 Md. 407; 6 Am. Rep. 340; *Robertson v. Parks*, 76 Md. 118; *Laverty v. Vanarsdale*, 65 Pa. St. 507. This case seems to be clearly within the rule. A verdict should have been directed for the defendants.

Reversed.

#### SUPPLEMENTAL OPINION ON REHEARING.

GRANGER, J. In a petition for a rehearing there is a very persistent contention that because of a conspiracy, the plaintiff has been deprived of a valuable business; and it is urged, that notwithstanding his connection with the organization of the compact, and his continued membership therein, he could not, by unlawful means, be deprived of property rights, and reliance is placed on the holding in *Longshore Printing Co. v. Howell*, 26 Or. 527; 46 Am. St. Rep. 640. We readily indorse the holding in that case. It is a case in which a typographical union, an unincorporated voluntary association, with rules for the regulation of its membership (an object of the union being to establish an equitable scale of wages, and to protect its members from sudden or unreasonable fluctuations in the rate <sup>612</sup> of compensation for their labor, etc.), attempted, in an unlawful manner, to compel members of the union and others to quit the employment of the plaintiff, a company engaged in lithographing, engraving, printing, and publishing journals, newspapers, etc. It appears that members of the union went upon the



premises of the plaintiff and intimidated members of the union there employed, by threats to enforce the rules of the union against them, so that, against their will, they quit such employment, to the injury of the plaintiff. The record in that case shows other acts of an unlawful character to the injury of the plaintiff. It appears in that case that a conspiracy was formed by the executive committee of the union and its members to destroy the plaintiff's business, or compel it to submit to the rules of the union, of which it was not a member. The opinion, after defining or specifying some things lawful for such organization, states: "No resort can be had to compulsory methods of any kind to increase, keep up, or retain such memberships. Nor is it permissible for associations of this kind to enforce the observance of their laws, rules, and regulations through violence, threats, or intimidation, or deprive persons of perfect freedom of action." The opinion holds, that such organizations may preserve their membership by reasoning, fair arguments, and even by persuasion and entreaty. It is to be remembered that the organization was a legal one, its methods to enforce its objects only being held illegal. The illegalities consisted in attempts to injure the plaintiff's business, which was legal, and interfering in an unlawful manner with the freedom of its employés. The case at bar has none of the features of that case. In this case the plaintiff was a member of an unlawful combination or compact. For six years or more he had been such, and the agencies, the loss of which constitutes the injury complained <sup>613</sup> of, came to him as a member of the compact, under an agreement to do the business of the agencies under the rules of the compact, and hence he had no lawful business. The transaction, in its entirety, was unlawful. There is not a semblance of a showing of a right to the agencies, except the will of the companies, and then only by virtue of the compact. We do not hold, that had there been a dollar of the lawful property or rights of the plaintiff taken because of his failure to observe the rules of the compact, he might not recover it. That question is not involved. It is purely an action for damages because of the loss of his business as an insurance agent, and it appears that, in a legal sense, he had none. What he did have, as we said in the opinion, he lost by his own illegal acts. He helped to put in operation the causes that deprived him of it. The petition for a rehearing is overruled.

**CONSPIRACY—FIXING PRICES.**—An agreement by two or more persons to do an unlawful act is a conspiracy: *Note to Macauley v. Tierney*, 61 Am. St. Rep. 779. Combinations of individuals, formed for the purpose of stifling competition in trade, are against public policy and illegal: *Texas etc. Oil Co. v. Adoue*, 83 Tex. 650; 29 Am. St. Rep. 690, and note, showing that contracts between individuals or private corporations to keep up the price of an article of utility are void. A pool or combination to control the price of beer in a city and county is unlawful: *Nester v. Continental Brewing Co.*, 161 Pa. St. 473; 41 Am. St. Rep. 894. If an unlawful agreement to raise the price of coal is entered into between dealers therein, the raising of the price in pursuance of such agreement, and to accomplish its purpose, is an overt act sufficient to sustain a conviction for conspiracy: *People v. Sheldon*, 139 N. Y. 251; 36 Am. St. Rep. 690. All combinations among persons or corporations, for the purpose of raising or controlling the prices of merchandise, or any of the necessities of life, are monopolies, and should receive the condemnation of the courts: *Note to People v. North River etc. Co.*, 18 Am. St. Rep. 873.

**CONSPIRACY AS A SUBJECT OF CIVIL ACTION.**—At common law, a conspiracy cannot be made the subject of a civil action, although damages result, unless something is done which, without the conspiracy, would give a right of action. The true test as to whether such action will lie is whether or not the act accomplished after the conspiracy has been formed is itself actionable: *Delz v. Winfree*, 80 Tex. 400; 26 Am. St. Rep. 755.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MARYLAND.**

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**FAITH v. BOWLES.**

[86 MARYLAND, 13.]

**CONDITION SUBSEQUENT, WHAT IS NOT.**—A conveyance of real property made for a full and valuable consideration declaring that the property “is for a public schoolhouse, as the property of the schools of said city and for no other purpose, in fee”; does not create a condition subsequent, and hence the property does not, on the abandonment of its use for school purposes, revert in the grantor or his heirs.

**CONDITIONS SUBSEQUENT ARE NOT FAVORED** in law, and hence are not raised by implication from the mere declaration in a conveyance of property that it is to be used for a special or particular purpose only.

George W. Smith, Jr., and William Kealhofer, for the appellant.

Lewis D. Syester and J. Clarence Lane, for the appellees.

<sup>14</sup> **ROBERTS, J.** This is an action of ejectment brought by the appellees <sup>15</sup> to recover from the appellant a lot of land in Washington county, in this state. The circumstances, under which this controversy arises are, that on the 4th of June, 1860, Washington county, a body corporate of said state, purchased from John J. Bowles and wife, for the consideration of one hundred dollars, a certain lot of land, upon which Bowles then resided, and which was known in the corporation of the town of Hancock as lot No. 23. A deed of that date for said lot was executed and delivered to said county by said Bowles and wife, containing the statement that it was granted to said county, “for a public schoolhouse, as the property of the schools of said county, and for no other purpose in fee.” The deed



also contains a special warranty and a covenant for such other assurances as may be requisite. Immediately after its purchase the lot was improved by the erection of a schoolhouse thereon, and it continued to be used for public school purposes until the 13th of December, 1889, when it was sold and conveyed by the board of county school commissioners of Washington county to the appellant, who converted the same into a dwelling-house, which for nearly seven years and until after this suit was brought, he has continued to occupy as a dwelling. This suit is brought by the widow and heirs at law of John J. Bowles, the original grantor in the first-mentioned deed, who claim that the lot was conveyed by Bowles, the grantor, upon the condition that the lot was to be used for "public school purposes and for no other use," and that the abandonment of its use for public school purposes was a breach of the condition subsequent, and worked a forfeiture in favor of the grantor's heirs, who are the appellees here.

The case was submitted to and tried before the court below, without the aid of a jury, and upon an agreed statement, the material facts of which have already been stated. So that the only inquiry necessary to be determined on this appeal relates to the proper construction and legal effect which should be given to the language employed in the deed <sup>16</sup> from Bowles and wife to Washington county. Questions of like character with the one here presented have frequently occupied the attention of the courts, so that there is no want of decisions to guide us in reaching a satisfactory conclusion.

In this case the original grantors are admitted to have received full consideration for the lot when sold, and while the question of the amount of the consideration paid can have no effect in enlarging or extending the estate conveyed, it has, nevertheless, an important bearing upon, and greatly aids in, the ascertainment of the intention of the parties to the conveyance. To determine correctly the meaning and effect of the language of the deed, which has brought about this controversy, it becomes our duty to ascertain as nearly as possible the intention of the parties, grantor and grantee. There can be no doubt of the intention of the grantors that the estate should be used for public school purposes. This is clearly manifested, but we search in vain for any words which indicate an intention that if the grantee omitted so to use the estate, and actually devoted it to another purpose, the same should thereupon be forfeited, and revert to the heirs of the grantors. Af-

ter careful examination we have found, as stated by Bigelow, C. J., in *Rawson v. Inhabitants*, 7 Allen, 129, 130; 83 Am. Dec. 670, "no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent, solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled." In this case the words sought to be construed as creating a condition were, "for a burying place forever," but the court held that it was not a condition. The grant in the case now under consideration was not a gratuity, nor merely voluntary, but made for a full consideration of the estate conveyed. <sup>17</sup> This being the case, and there being no qualifying terms indicating that the grantors intended to retain any benefits to themselves, or to impress upon the estate conveyed any restriction as to its alienation, which would necessarily be the effect of a condition subsequent, we find nothing to justify the appellee's contention. In the very recent case of *Kilpatrick v. Mayor*, 81 Md. 179, 48 Am. St. Rep. 509, this subject has been very fully considered and determines a question substantially the same as here. It is there held, that "conditions subsequent are not favored in law 'because on breach of such conditions there is a forfeiture, and the law is adverse to forfeitures': 4 Kent's Commentaries, 130; *Stanley v. Colt*, 5 Wall. 119. Therefore it is, that a condition will not be raised by implication from a mere declaration in the deed that the grant is made for a special and particular purpose, without being coupled with words appropriate to make such a condition: *Packard v. Ames*, 16 Gray, 327; *Bigelow v. Barr*, 4 Ohio, 358." To the same effect is the case of *Barker v. Barrows*, 138 Mass. 580, where the qualifying words are, "said lot of land to be used, occupied, and improved by said inhabitants as a schoolhouse lot, and for no other purpose": *Greene v. O'Connor*, 18 R. I. 56; *Higbee v. Rodman*, 129 Ind. 244. As also in the case of *Weir v. Simmons*, 55 Wis. 637, "where the grant was 'upon the express condition' that the grantee should pay to third persons, strangers to the deed, certain sums, the court construed the provision as not creating a condition subsequent, but as granting the land absolutely, subject to the sums specified as a charge or lien on it." The case illustrates how averse the courts are to uphold conditions that will defeat an estate vested. So in

*Strong v. Doty*, 32 Wis. 381, where land was conveyed in trust to be devoted to a designated use, the court held that because there were no words in the deed expressing an intent that the land should revert, there was no condition subsequent. In *Craig v. Wells*, 11 N. Y. 315, it was decided that a clause in the deed excepting and prohibiting specified uses of the land, did not create <sup>1b</sup> a condition. In *Thornton v. Trammell*, 39 Ga. 202, the words, "it being expressly understood that said tract is not to be put to any other use than" (specifying it), were held to create a covenant, but not a condition. In *Packard v. Ames*, 16 Gray, 327, it was held that a grant for a specified purpose, without other words, cannot create a condition. In *Sohier v. Trinity Church*, 109 Mass. 1, the words "in trust, nevertheless and upon condition always" (to use the premises for public worship), in a deed to a religious corporation, were held to create only a trust, and not a condition. It has been very earnestly contended on the part of the appellees that the cases of *Reed v. Stouffer*, 56 Md. 236, and *Second etc. Soc. v. Dugan*, 65 Md. 460, are directly in point as sustaining their view, but such is not the effect of the two cases. In both cases the property was conveyed to trustees in trust for certain uses and purposes, clearly defined in the deeds, and in each case the legal estate vested in the trustees for the purposes of the trusts. A totally different state of case to the one presented here, and in no respect entitled to be considered as controlling the question in controversy here. It results from what we have said that the court below committed error in granting the appellees' first prayer and in rejecting the appellant's fourth prayer, which should have been granted. The judgment below is therefore reversed, without a new trial.

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**CONDITIONS SUBSEQUENT—WHEN CREATED.**—Conditions which tend to divest an estate are to be strictly construed: Note to *Jackson v. Schutz*, 9 Am. Dec. 202, giving instances of conditions subsequent. Conditions subsequent are not favored, and may be created only by express terms or clear implication. The courts will always construe clauses in deeds as covenants rather than as conditions, if they can reasonably do so. Though apt words for the creation of a condition subsequent are employed, yet in the absence of an express provision for re-entry and forfeiture, the courts, from the nature of the acts to be performed or prohibited, from the relation and situation of the parties, and from the entire instrument, will determine the real intention of the parties: *Scovill v. McMahon*, 62 Conn. 378; 36 Am. St. Rep. 350, and note. A deed of land to a municipality which in the habendum adds the words, "as and for a street to be kept as a public highway" does not create a condition subsequent, and the property does not revert to the failure to use it as a street: *Kilpatrick v. Mayor of Baltimore*, 81 Md. 179; 48 Am. St. Rep. 509, and note.



## KERR v. URIE.

[86 MARYLAND, 72.]

**A MARRIED WOMAN IS CAPABLE OF ACQUIRING STOCK**, and being a stockholder, in a national bank, whether doing business in the state of her residence or in another state.

**HUSBAND AND WIFE.—A TRANSFER BY A HUSBAND TO HIS WIFE OF STOCK IN A NATIONAL BANKING CORPORATION**, made in good faith, vests her with the ownership thereof, and her equitable title is complete before a certificate is issued to her and before any entry of the transfer is made on the books of the corporation. After such transfer the husband is not subject to any liabilities which attach, under the laws of Congress, to the holders of stock in such corporations.

**NATIONAL BANKS—STOCKHOLDER'S LIABILITY, WHO HOLDS STOCK IN TRUST.**—One to whom stock in a national bank has been issued as self-appointed attorney of an infant of tender years, or for an undisclosed principal, is subject to the liabilities imposed by the acts of Congress upon stockholders in such banks.

**CORPORATIONS—STOCKHOLDER'S LIABILITY AS DEPENDENT UPON BOOKS OF.**—If, upon the books of a national banking corporation, one appears to be the owner of stock therein, he cannot escape liability by proving that he held it as trustee for some other person whose name and interests do not appear from such books.

James A. Pearce, for the appellant.

Charles F. Harley and John D. Urie, for the appellee.

<sup>72</sup> **FOWLER, J.** The question presented by this appeal is, whether a married woman residing in this state is capable of holding stock in a national bank located and doing business in the state of Texas, and, if so, whether she is liable as such stockholder under the personal liability provisions of section 5152 of the Revised Statutes of the United States.

Whatever difficulty may surround this question arises, we think, more from the manner in which it is presented in this case than from any other cause, for it can hardly be supposed that at this day when, by the law of most all the states, a married woman may contract as a feme sole in respect to her separate estate, she is without power to subscribe for or become the transferee of the stock of a national bank. The learned author of Cook on Stocks and Stockholders, expresses the opinion that, without doubt, a married woman may become the transferee of such stock: Cook on Stocks and Stockholders, sec. 250. Certainly a feme sole may be such a stockholder, and would undoubtedly be subject to all the personal liabilities imposed <sup>74</sup> by section 5152 of the Revised Statutes. And, if this be so, what would be the effect of her marriage upon her right

to hold bank stock? Would she be any the less a stockholder after than before her marriage? There is certainly nothing in the acts of Congress which can be held to exclude married women from the privilege of owning this class of valuable personal property.

The question before us is thus presented: It appears from the agreed statement of facts that in April, 1891, the defendant, John D. Urie, purchased for the benefit of his infant daughter, a child four years old, ten shares of the capital stock of "The City National Bank of Quanah," and that his wife requested that the certificate therefor should be placed in her name, which was accordingly done. The bank having called upon Mrs. Urie to pay into its surplus two hundred and fifty dollars, she was unable to do so, and the defendant, her husband, agreed to and did furnish the money the bank had called for, provided the stock in question would be transferred to him to be held for the benefit of their infant child, as Mrs. Urie had held it in the first instance. The original certificate which had been issued to her, was accordingly surrendered, and another was issued to the defendant in February, 1892, which he subsequently transferred to her at her request, and in consideration of one hundred and twenty-three dollars and ten cents paid to him by her. It is admitted that this transfer is bona fide and for value. The assignment by the defendant was to his wife as attorney, and the certificate was so drawn, but it appears by the agreed statement of facts that the stock was issued to and held by Mrs. Urie personally, as shown by the stub of the stock book. The bank having become insolvent, a receiver was duly appointed, who has instituted suits against the stockholders of said bank to enforce the personal liability provided by section 5152 of the Revised Statutes. But instead of suing Mrs. Urie, who, according to the books of the bank, is the holder of the stock, suit has been brought against her husband, upon the theory that his transfer of <sup>75</sup> the stock to her is void, not, however, by reason of any fraud, or irregularity in the transfer, but upon the sole ground that Mrs. Urie, being a married woman, is incapable of being a stockholder. Such a proposition at first blush would seem to be altogether untenable, nor do we think this first impression has been overcome by any argument we have heard. It is too late at this day to regulate the property rights of married women by the ancient common law of England. That has been abrogated in this country almost universally, and as Mr. Cook says, married women may doubtless,

in all the states, become transferees of bank stock, and the learned counsel for the appellant is forced to admit that if the law as thus laid down is to prevail, his proposition must fail.

If the question before us had arisen out of a contract conceded to be a Maryland contract, we think there could not have been any doubt as to the legality of Mrs. Urie's holding, for under our statute all the property, real and personal, belonging to a woman at the time of her marriage, and all property which she may acquire by purchase, gift, grant, devise, bequest, descent, or in course of distribution, she shall hold for her separate use, etc. There can be no doubt, therefore, that a married woman who is in possession of bank stock before she is married, or which after marriage came to her as provided by the statute, she would hold it as her separate property as provided by the code. The fact that her power of disposition may be limited makes her none the less a stockholder. But it is said the contract is not a Maryland contract, but is a contract made in Texas, and that therefore the rights of the parties must be determined by the law of the latter state. And this contention is based upon the proposition that a subscription made in one state to capital stock of a corporation which exists in and carries on its business in another state, is a contract to be performed in the latter state and is governed by the laws of that state. While this general proposition may be conceded, yet it must be remembered that the contract we are <sup>70</sup> considering is not the contract of subscription, but the contract by which the defendant transferred to his wife the stock already subscribed for by her. It would seem to follow if the contention of the appellant be correct, namely, that Mrs. Urie has no legal capacity to subscribe for or hold the stock, that the original contract of subscription which was made by her and in her own name, although the money was furnished by her husband, was null and void; and therefore no liability ever arose under section 5152 of the Revised Statutes, and hence the defendant never incurred any liability thereunder, unless the mere fact that he furnished the money to pay for the stock would make him so liable—and this cannot be, because the liability under section 5152 of the Revised Statutes, attaches only to persons who are stockholders, either in their own right, or in some representative capacity not exempted by the express terms of that section. But be this as it may, we have already said the question now before us is the validity of transfer of the stock by the defendant to his wife. By means of this con-



tract of transfer, which was made in this state by two citizens of this state, and therefore to be governed by the laws of this state, the defendant in good faith and for value assigned, and we think had a right, no creditor of his objecting, to thus assign it. The contract was complete when the transfer was made, and his ownership of the stock, which is conceded, carried with it, according to the weight of authority of the later decisions, the right to make the transfer, because stock is characterized by the same features as other forms of personal property. Nor was it essential to the transferee's equitable title that she should have a new certificate issued to her. It was said by Davis, J., in the leading case of *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 81, "that the nonproduction and surrender of the certificate at the time of transfer is not fatal to the title of the transferee. It is only essential to the safety of the corporation." And in *Baltimore City etc. Ry. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402, it is said that when shares are assigned, although not made on the books of the corporation, "title passes to the assignee. In later cases (*Baltimore etc. Brick Co. v. Mali*, 65 Md. 96, 97; 57 Am. Rep. 304; *Swift v. Smith*, 65 Md. 435; 57 Am. Rep. 336, and *Noble v. Turner*, 69 Md. 524), it was held that such a title is an equitable title, giving to the transferee the right to enforce actual entry of the transfer upon the books of the corporation, and thus to convert the equitable into a legal title. We conclude, therefore, that by virtue of the transfer in Maryland, and without regard to the laws of Texas, Mrs. Urie became the equitable and real holder of the stock in question, and if this be so, no question as to her powers of disposition, or as to whether she is or is not capable under the laws of Texas to make contracts can arise in this case, for the liability of a stockholder arises not under any law of Texas, which it is contended has not been proven in this case, but under the act of Congress. And the contracts which it is claimed she is liable on are not her contracts, but the contracts of the bank: *Witters v. Sowles*, 35 Fed. Rep. 641; U. S. Rev. Stats., sec. 5152. The right to be a stockholder is given to her by the law of the state where she resides, and her rights and liabilities as such are provided by the acts of Congress. But if we could, without proof, say what is the law of Texas, it will be found upon this question the same substantially as ours. "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent . . . shall be the separate property of the wife": *Tex. Rev. Stats.*, sec. 2967.

The case of *Keyser v. Hitz*, 133 U. S. 151, was relied on by the defendant to show that his wife and not he, was the real holder of the stock in question, and therefore she was the proper defendant in this suit. Assuming that she had a right to hold the stock under our state law, this case is, we think, conclusive authority upon the controlling question before us. In delivering the opinion of the court, Harlan, J., said: "The only persons holding shares of national bank stock whom the statute exempts from personal <sup>78</sup> responsibility, are executors, administrators, guardians, and trustees: U. S. Rev. Stats., sec. 5152. It is not for the courts by mere construction to recognize exemptions which Congress has not made. The hardship that may result where the ownership of national bank stock by a married woman is subject to the common-law rights of her husband in respect to alienation, cannot control the interpretation of the statute. Such considerations are more properly for the legislative department." In the matter of *Reciprocity Bank*, 22 N. Y. 15, Comstock, J., expressed the same view, and said that the law in regard to the imposition of personal liability of stockholders ought to be so construed as to maintain it in its integrity, and that to hold married women exempt from its provisions would go far to defeat its policy.

The appellant, however, contended that admitting that Mrs. Urie was authorized to hold the stock beneficially she did not so hold it, but in fact held it as attorney, agent, trustee, or in some representative capacity. But it is clear from the evidence that she either holds as self-appointed attorney or trustee for an infant of tender years; for an undisclosed principal as appears by the certificate, or personally and beneficially, as appears by the stub of the stock book of the bank. In neither event do we think she can evade the personal liability of a stockholder. If persons were allowed to subscribe for stock in a national bank, or in any other corporation, where a personal liability attaches, either as attorney for an unnamed principal, as self-appointed trustee for some unnamed cestui que trust, or as attorney for an unnamed infant of tender years, and when called upon to pay the debts of the bank to the extent of the stock so subscribed, could escape by simply declaring that they represented, in some capacity, those who are legally or otherwise incapacitated, the law would be a dead letter, and the creditors of these associations, which are found in great numbers in every state, would be deprived of the only certain means provided by law for the payment of their claims. But, in addition to this, it is well set-

tled upon authority that one assuming to act as <sup>70</sup> Mrs. Urie has acted becomes personally bound. The infant not being liable, liability attaches to the person who makes the subscription, and if that person has transferred the stock to one capable of taking and holding it, the liability passes to the latter: Cook on Stocks and Stockholders, sec. 67. The only safe rule on this subject is that when stock is held in a representative capacity it should be noted in the stock book of the bank, and if a person appears there as an absolute owner of the stock, he will not generally be permitted to deny it. If he claims to be trustee and does not disclose it, he is guilty of laches, for which others should not suffer. "The settlement of the affairs of an insolvent bank would be rendered a matter of great expense and delay if persons who appeared on the books of the bank as individual stockholders were permitted to relieve themselves by proving that they held the stock in a representative capacity": Davis v. Essex Baptist Assn. 44 Conn. 582; Brown's Nat. Bank cases, 110. But this court has disposed of this question in the same way in Magruder v. Colston, 44 Md. 356, 22 Am. St. Rep. 47, thus: "If creditors must look beyond the legal title, as exhibited by the books of the bank, they can never know against whom to proceed." Mrs. Urie, as we have seen, was, according to the books of the appellant bank, the absolute owner of the stock.

Having concluded that Mrs. Urie is the holder of the stock in question it follows that the plaintiff's prayers were properly refused. The rulings of the court upon the defendant's prayers, and upon the demurrer to his plea, are not before us.

Judgment affirmed.

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**CORPORATIONS—MARRIED WOMEN AS STOCKHOLDERS—LIABILITIES OF.**—Since a married woman may become the owner of stock of a corporation, and since the liability of stockholders for the debts of the corporation is a statutory liability and incident to the ownership of stock, it is settled that a married woman is subject to such liability: See monographic note to Thompson v. Reno Sav. Bank, 3 Am. St. Rep. 867.

**CORPORATIONS—STOCKHOLDERS—WHO ARE.**—If the name of a person appears on the stock-book of a corporation as a stockholder, this is prima facie evidence that he is the owner of stock: Holland v. Duluth Iron etc. Co., 65 Minn. 324; 60 Am. St. Rep. 480. The issuance of a certificate is not necessary: Note to Thompson v. Reno Sav. Bank, 3 Am. St. Rep. 859, 860; as such a certificate is only evidence of ownership of shares: Cartwright v. Dickinson, 88 Tenn. 476; 17 Am. St. Rep. 910; Holland v. Duluth Iron etc. Co., 65 Minn. 324; 60 Am. St. Rep. 480, and note. So one who stands upon the books of a corporation as a stockholder, may be proceeded against for the recovery of any sum due upon the stock, although he in fact holds such stock as trustee for another: Note to Thompson v. Reno Sav. Bank, 3 Am. St. Rep. 832. See Bell's Appeal, 115 Pa. St. 88; 2 Am. St. Rep. 532.



**HARTFORD FIRE INSURANCE COMPANY v. KEATING.**

[86 MARYLAND, 130.]

**INSURANCE.—STATEMENTS RESPECTING THE NATURE AND EXTENT** of the interest of the insured are material, and must be construed so as to effectuate the purposes of the parties.

**INSURANCE.—TO BE UNCONDITIONAL AND SOLE AN INTEREST** must be completely vested in the assured, not contingent or conditional, nor for others, or for life only, nor in common, but of such nature that the assured must sustain injury or loss if the property is destroyed, and this is so whether the interest is legal or equitable.

**INSURANCE.—UNCONDITIONAL AND SOLE INTEREST, WHAT IS.**—One who has purchased property at a judicial sale, but whose bid has not been ratified, nor the sale confirmed by the court, has not an unconditional and sole interest therein.

**INSURANCE.—GENERAL AGENT, WHO IS.**—One supplied with policies and blanks and given authority to issue them, and who, in fact, signs, issues, and delivers policies, and receives and accounts for premiums, is a general agent of the insurer in the matter of soliciting and accepting risks and agreeing upon terms and contracts of insurance.

**INSURANCE.—ESTOPPEL BECAUSE OF KNOWLEDGE OF AGENT.**—If a general agent of the insurer has, at the issue of a policy by him, full knowledge that the assured is not the unconditional and sole owner of the property, his principal is estopped, after a loss, from asserting the want of such knowledge as a defense.

**INSURANCE.—STIPULATIONS AGAINST WAIVERS BY AGENTS.**—Though a policy of insurance provides that no officer, agent, or other representative of the company shall have power to waive any provision or condition therein, except such as by the terms of the policy may be indorsed thereon or added thereto in writing, such restriction does not apply to the making of the contract, but only to matters arising after it has become effective.

**INSURANCE.—AN INSURABLE INTEREST EXISTS ONLY** when the insured has such an interest in the property that its destruction will result in pecuniary loss to him. If he has such an interest, it is not necessary that he should have the title.

**INSURANCE.—AN INSURABLE INTEREST NEED NOT BE PERSONAL,** but may be an interest existing in the insured as trustee, agent, administrator, judgment creditor, and the like.

**INSURANCE.—INSURABLE INTEREST—ATTORNEYS.**—If a policy of insurance on real property is made payable to A and B, attorneys, as their interest may appear, and it is shown that such property has been sold at a judicial sale, and part only of the purchase price paid, and that such attorneys represent the plaintiff in the suit to whom the balance of the purchase money was due, such attorneys and those whom they represent had an insurable interest in the property, and the payment of loss cannot be avoided for want of such interest on the part of such attorneys.

**INSURANCE.—PROOFS OF LOSS—WAIVER.**—If there is such conduct on the part of the insurer or his agent as induces the assured reasonably to believe that proofs of loss were not to be demanded, and he, acting under such belief, failed to furnish such proof in the time required by the policy, the insurer cannot take advantage of such failure.

**INSURANCE—PROOFS OF LOSS—WAIVER OF, WHAT IS.** If, after a loss, an agent of the insurer examines into the circumstances of the loss and the value of the property, and states that he will send a check for the amount of the policy, and the assured therefrom understands that he will not be required to furnish proofs of loss, as stipulated for in the policy, the payment of the loss cannot be resisted because of the failure to furnish such proofs.

**INSURANCE—AGENT—APPARENT AUTHORITY OF.**—An agent of the insurer sent to view the premises and investigate the loss has apparent authority to waive the furnishing of proofs of loss.

Action by T. J. and B. P. Keating to recover upon a policy of insurance against loss by fire issued to F. W. Draper, and made payable to plaintiffs as attorneys as their interest may appear. The trial judge instructed the jury in favor of the plaintiffs upon the various questions of law involved in the case, and the jury returned a verdict, and judgment was entered against the defendant insurance corporation. The defendant offered eleven prayers for instructions, all of which were refused. The first was that the plaintiffs could not recover; the second, third and eleventh, that they never had any insurable interest; the fourth, that the policy was void, because Draper had not, at its issuance, paid the purchase price; the fifth, that if the defendant had no knowledge of the nature of the title, there could be no recovery, though the local agent had such knowledge, but did not communicate it; the sixth, that if an order for the resale of the property, because of the failure of Draper to pay the balance of the purchase price, was made, this was such a change in interest as avoided the policy; the seventh and ninth, that if the property was destroyed on January 5, 1895, and proofs of loss were not furnished until March 19th of the same year, that plaintiffs could not recover; the eighth, that if a judgment had been filed creating a lien against Draper, the verdict must be for the defendant; and the tenth, that the preliminary proofs of loss had not been furnished, as required by the policy, and hence the plaintiffs could not recover.

E. P. Keech, Jr., and Geo. Morris Bond, for the appellant.

Edward N. Rich and William S. Bryan, Jr., for the appellees.

**142** PAGE, J. This is an action on a policy of insurance issued by the appellant, insuring the property of one Frank W. Draper against loss by fire. The policy was issued to Draper, and on the second day of October, 1894, at the request of Draper, by proper indorsement, the loss was made payable to the appellees "as their interest may appear." The property insured

was a two-story frame building on a lot situated in the town of Centreville. The whole property, prior to the accrual of Draper's title, had belonged to a Mrs. Sparks, who held a policy of insurance on the house, issued by the <sup>143</sup> appellant. This policy was cancelled on the 10th of January, 1893, the same day on which the policy sued on in this case was issued. In September, 1892, the appellees, as attorneys, in a mortgage from Mrs. Sparks to Eliza Wilkinson, sold the lot and improvements to Draper. The sale was reported to the court, and ratified nisi on the 27th of September. Draper complied with the terms of sale, by making a cash payment of seven hundred and thirty-two dollars and fifty-five cents, and executing with sureties, and delivering to the appellees two notes for five hundred and ninety-seven dollars and seventy-six cents and five hundred and sixty-five dollars and seventy-three cents, respectively, and thereupon entered into the possession of the property. One of the appellees then demanded of Draper that he should insure the house and transfer the policy to them, and it was in pursuance of this that the policy was issued and the loss afterward made payable to the appellees as attorneys. It was issued by Frank Keating, who was then the agent of the company, intrusted by it with the possession of blank policies, authorized to sign and issue them, receive the premiums and account for them; and moreover was the company's only agent in Centreville. It is admitted that when the policy was issued, he was fully cognizant of the character of Draper's title, the nature of the appellee's interest in the matter, and the understanding between Draper and the appellees under and by which the insurance was applied for. Keating, besides being the agent of the company, was also a clerk in the lawoffice of the appellees, and, as such, had drawn all the papers connected with the sale of the property (except the order of final ratification), and therefore knew all the facts and circumstances of the case. In October, 1893, he ceased to be the agent of the company, and Thomas J. Keating, Jr., was appointed in his stead. A small fire having injured the property in January, 1894, the company paid in February the loss on account thereof to Draper. Shortly after this, the appellees ascertained that in consequence of a neglect of Frank Keating, the policy had not been transferred to them, as it was agreed should be done. Accordingly they took steps to have this effected, and on the 2d of <sup>144</sup> October, 1894, the indorsement was made on the policy by Thomas J. Keating, Jr., the agent, and by him on the same day forwarded to the company, who received it on the 5th of October. At



that time this agent knew the exact state of Draper's title and of the interest of the appellees, but did not notify the company further than appeared in the policy and his daily report, neither of which make mention of any encumbrances. Subsequently, Draper having made default in the payment of his notes, the appellees, on the 3d of December, obtained a final order for a resale of the property at his risk, but before a sale was had, on the 5th of January, the building was totally destroyed by fire.

Upon this state of facts the appellants contend: 1. That Draper's interest was "other than unconditional and sole ownership," and therefore the policy by its terms is void; and 2. That the appellees had no insurable interest in the property.

The policy contains the condition, that "if the interest of the insured be other than unconditional and sole ownership," it shall be void, "unless otherwise provided by agreement indorsed" thereon or added thereto. This is a part of the contract of insurance; it is binding on both parties, and must be construed by the same rule as other contracts. "The court must give to the language used its just sense, and search for the precise meaning and one requisite to give due and fair effect to the contract, without adopting either the rule of a rigid or of an indulgent construction": *Washington Fire Ins. Co. v. Kelly*, 32 Md. 446; 3 Am. Rep. 149. In the case just cited, this court has stated the general purpose for the insertion of conditions like the one now under consideration in insurance policies. It is there said: "They were doubtless originally directed against wagering policies, and were intended to protect underwriters from paying losses to those who in fact had not sustained them, who really had nothing at hazard, and whose interest, therefore, was that the event should happen." The nature and extent of the interest of the insured, are matters largely influential with underwriters in taking or <sup>145</sup> rejecting risks and estimating premiums, and, for that reason, any condition respecting them in the contracts is material, and must be construed so as to effectuate the purposes of the parties. But while this must be done, the law assumes that the parties understood the words they have used, and, therefore, unless there are potential reasons to the contrary, they are bound by the legitimate and usual meaning of the phrases they employ. Now it must be observed that it is not title, but interest that is spoken of in the clause. Title and interest are entirely different things. It was undoubtedly competent for the parties to have contracted as to the title, as was done in *Wineland v. Security Ins. Co.*, 53 Md. 283; but in this

case they have chosen to limit the provisions of the clause to the condition of the interest, either legal or equitable. The question therefore presented to us now is, Was the "interest" (legal or equitable) of Draper, "unconditional and sole?" As to the meaning of these words when used in the present connection, there seems to be a concurrence of authority. To be "unconditional and sole" the interest must be completely vested in the assured, not contingent or conditional, nor for years or life only, nor in common, but of such a nature that the insured must sustain the entire loss if the property is destroyed; and this is so whether the title is legal or equitable: *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. St. 475; 2 Am. St. Rep. 686; *Pennsylvania Fire Ins. Co. v. Dougherty*, 102 Pa. St. 572; *Rumsey v. Phoenix Ins. Co.*, 17 Blatch. 529; *Dupreau v. Hibernia Ins. Co.*, 76 Mich. 615; *Aetna Fire Ins. Co. v. Tyler*, 16 Wend. 396; 30 Am. Dec. 90; *Oshkosh etc. Co. v. Germania Fire Ins. Co.*, 71 Wis. 455; 5 Am. St. Rep. 233; *Washington Ins. Co. v. Kelley*, 32 Md. 421; 3 Am. Rep. 149; *Clay etc. Ins. Co. v. Beck*, 43 Md. 358; *Westchester Fire Ins. Co. v. Weaver*, 70 Md. 540.

We have been referred to cases, where it is held that when the insured is in possession under a contract of purchase and the legal title has not passed by a conveyance, the ownership is not unconditional until the purchase money has been wholly paid: *Farmers' etc. Ins. Co. v. Curry*, 13 Bush, 312; 26 Am. Rep. 194. But it may be doubted whether such cases are in line with <sup>140</sup> the current of authority. We are not concerned, however, with that question; for at the time the policy was issued, Draper was not in the position of a purchaser, but that of a bidder only for the property. His offer of purchase had not then been ratified by the court, and until it was, the contract was not complete, and his interest in the property was dependent upon the subsequent action of the court. Prior to the final ratification his interest was only an inchoate right: *Lannay v. Wilson*, 30 Md. 551. The effect of final ratification, it is true, was retroactive, so that he became invested with the title from the day of the sale; but at the time the policy was issued, his interest was entirely conditional, depending, as it did, upon the final order of the court.

The appellees, however, insist the appellant is estopped from setting up this defense, because their agents knew all the facts, both at the time the policy was issued, and when the indorsement was made to the appellees. The policy was issued through Frank Keating, and from all the evidence before us we think

he must be regarded, while so acting, as the agent of the company. The proof shows that he was supplied with policies in blank, was authorized to issue them, signed them and delivered them to the parties who desired insurance, received the premiums and accounted for them to the company. Such authority constituted him a general agent of the company within the territory assigned him, in the matter of soliciting and accepting risks, and agreeing upon the terms and contracts of insurance: *Continental Ins. Co. v. Ruckman*, 127 Ill. 372; 11 Am. St. Rep. 121; *Insurance Co. v. Wilkinson*, 13 Wall. 222; 2 Wood on Fire Insurance, sec. 409; *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619; *Hotchkiss v. Germania Fire Ins. Co.*, 5 Hun, 90. If such an agent has knowledge of the facts at the time he issues the policy, the company will be estopped from relying upon them as a cause of forfeiture. This principle is well sustained by authority; it rests upon considerations of common honesty, that an insurer with full knowledge of the facts or chargeable<sup>147</sup> with such knowledge, shall not enter into a contract of insurance, receive the premiums thereon, and then be permitted to set up those facts to evade the liabilities the contract imposes on him. Nor does the clause providing that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be indorsed hereon or added hereto," etc., affect the question. It does not apply to the making of the contract, but to the provisions of the contract itself, after it has gone into effect, so as to prevent agents from modifying the terms of the policy after it has been issued. The general doctrine is well stated in *Wood v. American Fire Ins. Co.*, 149 N. Y. 384; 52 Am. St. Rep. 733. The court then said: "That the general agents of an insurance company may waive stipulations and provisions contained in the policy with respect to the conditions upon which it shall have inception and go into operation as a contract between the parties, by delivering it with knowledge of all the facts and receiving the premium, has long been settled. It is so obviously just, that a party to a written contract should be precluded from defeating it by asserting conditions and stipulations contained in it, which would prevent its inception, and which he knew at the time he delivered it and accepted the benefits were contravened by the actual facts, that any statement upon which the rule rests is no longer necessary. The restrictions inserted in the contract upon the power of the agent to waive any condition, unless done in a



particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract, when it appears that the agent has delivered it and received the premiums with full knowledge of the actual situation": *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; 11 Am. St. Rep. 121; *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102; 11 Am. Rep. 469; *Maryland etc. Ins. Co. v. Gusdorf*, 43 Md. 514; *American Life Ins. Co. v. Mahone*, 21 Wall. 152; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Ben Franklin Ins. Co. v. Gillett*, 54 Md. 218.

<sup>148</sup> There is no evidence in the cause that tends to prove that Frank Keating was the agent of the appellees in any respect touching the matter of insurance. It is clear, however, that at the time the policy was issued he was fully informed of the state of Draper's title, and that the policy was desired to cover also the interest of the appellees. It follows from what precedes, we find no error in the rejection of the appellant's fourth and fifth prayers.

The second and third prayers of the defendant raise a question as to whether the appellees had an insurable interest in the property. The contract of insurance, being one of indemnity, the insured must have such an interest in the property as that its destruction will result in pecuniary loss to him. But it is not necessary he shall have a title, provided his interest, whatever it may be, is such that it would be impaired or injured by its destruction: *Franklin Fire Ins. Co. v. Coates*, 14 Md. 297.

Nor is it requisite, that the interest be personal if the insured has an interest in the property as agent, trustee, etc., or hold such relation to the property, that its destruction will involve pecuniary loss to him or to those for whom he acts. For this reason it has been held, that an administrator where the personality was insufficient to pay the debts, had an insurable interest in the real estate: *Clinton v. Hope Ins. Co.*, 45 N. Y. 454. And so of a judgment creditor (*Rohrback v. Germania Fire Ins. Co.*, 62 N. Y. 47; 20 Am. Rep. 451), and of a surety responsible for a mortgage debt: *Insurance Co. v. Thompson*, 95 U. S. 547.

In the case at bar, the assignment is to the appellees' "attorneys, as their interest may appear"; that is, the indemnity secured by the policy shall extend to and include such interest in the property as the appellees might hold as attorneys. When the assignment was made, the sale had been reported and finally ratified. At the time of the fire, a large part of the purchase money being then unpaid, the attorneys had obtained from the court an order for a resale at the risk of Draper. It is not dif-

ficult to perceive how <sup>149</sup> the attorneys, for themselves and those whom they represented, were interested in the property to the full extent of the unpaid purchase money, and how its destruction would affect them. These remarks dispose of the appellant's second and third prayers, which were properly rejected.

It is further contended there can be no recovery, because of the failure of the appellees to furnish the proofs of loss within sixty days after the fire. The policy provides this shall be done, unless the time is extended in writing, and further, that the loss shall not be payable until sixty days after the proofs of loss have been received by the company. It was argued on the part of the appellees, that "the sole penalty" under the terms of this policy, of a failure to promptly file proofs of loss, is to suspend the right of action until such proofs are filed. There are some authorities that seem to sustain this contention. The general doctrine, however (and without deciding how far it is applicable to a policy like the one in this case), maintained by the great weight of authority and by our own decisions, is, that conditions like this form parts of the contract of insurance and are binding on both parties and must be complied with: *Spring Garden Ins. Co. v. Evans*, 9 Md. 13; 66 Am. Dec. 308; *Citizens' etc. Ins. Co. v. Doll*, 35 Md. 89; 6 Am. Rep. 360; 2 *Wood on Fire Insurance*, sec. 439, et seq.

But all the authorities agree that this condition may be waived, either expressly or by acts and conduct of the insurer himself, or of his agent, having real or apparent authority; and the waiver may be inferred from such acts and conduct as are inconsistent with an intention to insist upon a strict performance: *Rokes v. Amazon Ins. Co.*, 51 Md. 512; 34 Am. Rep. 323.

And the reason for this rule obviously is, that an insurer whose conduct is such as to induce the insured to rest under a well-founded belief that strict performance of such a condition will not be insisted on, cannot, in good faith, afterwards set it up as a bar to recovery. If, therefore, there was such conduct of the appellant or of its agent (with competent authority) as induced the appellees reasonably to believe <sup>150</sup> that proofs of loss would not be demanded and they did so believe, and by reason thereof they failed to make and file them with the company within the prescribed time, it would offend every principle of natural justice to permit the insurer to take advantage of it; 2 *Wood on Fire Insurance*, 470, et seq., and authorities there cited, especially the case of *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136;

86 Am. Dec. 362; Georgia Home Ins. Co. v. Kinnier, 28 Gratt. 88; Little v. Phoenix Ins. Co., 123 Mass. 380; 25 Am. Rep. 96; Eastern R. R. Co. v. Relief etc. Ins. Co., 105 Mass. 570. The proof shows that shortly after the fire, Catanach, a special agent of the appellants, went to Centreville to view the ruins of the property, and investigate all the circumstances attending the loss. While there he had a conversation with Thomas J. Keating, one of the appellees. After some general talk about the fire, the latter said to him, "When you send the money for the loss of this property, I want you to send us a separate check for our interest in the matter"; Catanach replied, "No, I cannot do that"; Keating asked, "What will you do"; the reply was "send a joint check to you gentlemen as attorneys and to Mr. Draper." Keating then explained to him, he was afraid he would have trouble with Draper about getting him to sign a joint check. Later on Keating, Jr., the agent, wrote to Catanach that Draper was inquiring about his loss, and that he (the agent), simply tells him it is "in the hands of the company"; and two days later, on the 20th of February, he again writes to Catanach, this time to say, "the attorneys for the mortgagee in the Draper matter have requested me to write and ask you to send a proof of loss, so that they could make it out and get Draper to make oath to it. I told them that you usually attended to the making out of the proof, but that I would write you about it." On the 23d of February, 1895, Catanach replies; he writes: "Inasmuch as we have notice of attachment proceedings at Baltimore in regard to this loss, it is important that great care should be exercised in the matter on this account; while I have at times made up proofs of loss, it is not customary to do so, <sup>151</sup> and in all cases of litigation I decline to do so, or allow the agent to take any part in furnishing or making up proofs of loss, but that no obstacle may be thrown in the way of the assured," he directs the agent to inform him where printed blanks can be had, etc. There was evidence tending to show that the request for "the proof" of loss "to be made out," was made by Palmer Keating, who did not have charge of the business and had no knowledge of the previous conversations of Catanach with his brother Thomas, who testified that after his conversation with Catanach he did not think it was necessary to file proofs of loss, but that afterward he had done so because he thought it would do no harm, and Catanach had desired it to be done. In the first prayer of the appellees the jury were required to find as one of the conditions of the right of the plaintiffs to recover: That



after the fire, "Catanach went to Centreville, examined into the circumstances of said fire, and the value of said dwelling, and that after having done so had a conversation with Thomas J. Keating, one of the plaintiffs, in which he stated that the dwelling was a total loss, and in answer to a request of the said plaintiff that the check for the plaintiffs' interest in said loss should be payable to the plaintiffs' order, stated that the said check could not be made payable to the plaintiffs' order, but would be made payable to the order of Frank W. Draper, and the plaintiffs jointly; and further find that from such conversation the said plaintiffs believed that the defendant's agent had waived formal proofs of loss, and that the said Catanach did intend thereby to waive such proofs of loss, etc." Now if Catanach stated to the appellees that he would send a joint check, it was a recognition of the liability of the company, and wholly inconsistent with an intention to contest the plaintiffs' right of recovery. And if the jury found the appellees so understood it, and Catanach so intended it, and the acts of the plaintiffs were thereby influenced by it, the legal conclusion of the court, that the facts so put to the jury, constituted a waiver, was entirely warranted. In reply to the objection that there is no proof <sup>152</sup> of Catanach's power or authority to waive this condition, all we have to say is, it was at least within the scope of his apparent authority. He was a special agent of the company sent by it to view the ruins, investigate the loss, and find out as much about it as he could. Mr. Keating, the agent, when asked about the policy and when it will be paid, consults Mr. Catanach, who replies authoritatively in his letter of 23d of February. And when finally proofs of loss are made, they pass to Mr. Bond, an agent, who testifies he sent them to Catanach, and the matter was then turned over to him for such action as he should see proper in the premises.

These facts, we think, clearly show that he held the actual, or at least the apparent, authority to examine into and adjust the circumstances of the loss and the liability of the company. We think the defendant's 7th, 9th, 10th and 11th prayers ought not to have been granted. The defendant's 6th prayer was properly rejected because there was no evidence of a change in the title of possession: *Washington Fire Ins. Co. v. Kelly*, 32 Md. 446; 3 Am. Rep. 149. Of the defendant's 8th prayer it is only necessary to say there is no condition in the policy against encumbrances: *Bowman v. Franklin Fire Ins. Co.*, 40 Md. 620. There were other points raised and discussed at the argument, but in-

asmuch as what has been said practically disposes of all the questions in the case, we will not prolong this opinion by adverting to them.

We find no error in any of the rulings of the court and the judgment will therefore be affirmed.

**INSURANCE—CONDITION AS TO OWNERSHIP—WAIVER OF.**—The condition in a policy of insurance that it shall be void in case the interest of the assured be other than "unconditional and sole ownership" refers only to the quality of the estate or interest: *Phoenix Ins. Co. v. Bowdre*, 67 Miss. 620; 19 Am. St. Rep. 326; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743; 58 Am. St. Rep. 719, and note; *Loventhal v. Home Ins. Co.*, 112 Ala. 108; 57 Am. St. Rep. 17, and note. An insurer may be estopped to declare a forfeiture for breach of this condition where he fails to make any inquiries concerning the insured's title: *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743; 58 Am. St. Rep. 719; or where the insurer's agent, before completing the insurance, had notice that the insured's interest was not such as the policy required: *Graham v. Fire Ins. Co.*, 48 S. C. 195; 59 Am. St. Rep. 707, and note.

**INSURANCE COMPANIES—WHO ARE GENERAL AGENTS AND THEIR POWERS.**—One constituted the agent of an insurance company to accept risks, to agree upon and settle terms of insurance, and to carry them into effect by issuing and renewing policies, must be regarded as a general agent: *Goode v. Georgia Home Ins. Co.*, 92 Va. 392; 53 Am. St. Rep. 817, and note. Such general agents may waive stipulations and conditions contained in a policy of insurance with respect to the conditions upon which it shall go into operation, by delivering it with knowledge of the facts and accepting the premium: *Wood v. American Fire Ins. Co.*, 149 N. Y. 382; 52 Am. St. Rep. 733, and note. See *Taylor v. State Ins. Co.*, 98 Iowa, 521; 60 Am. St. Rep. 210, and note.

**INSURANCE — INSURABLE INTEREST — WHAT CONSTITUTES.**—Even one who has no title, legal or equitable, in property, and no present possession or right of possession thereof, has an insurable interest therein if he will derive benefit from its continuing to exist, or will suffer loss by its destruction: *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743; 58 Am. St. Rep. 719, and note; *Graham v. Fire Ins. Co.*, 48 S. C. 195; 59 Am. St. Rep. 707, and note. It may be a special or limited ownership, disconnected from any title, lien, or possession: *Rochester Loan etc. Co. v. Liberty Ins. Co.*, 44 Neb. 537; 48 Am. St. Rep. 745, and note.

**INSURANCE—PROOFS OF LOSS—WAIVER OF.**—Although the insured, after a loss has occurred, fails to comply with the stipulation in the policy requiring proofs of loss, the insurer may be estopped to set up such failure as a ground of forfeiture, where defective proofs are accepted without objection: *Morotock Ins. Co. v. Cheek*, 93 Va. 8; 57 Am. St. Rep. 782, and note; or the insurer refuses to pay upon other grounds: *Lumbermen's Mut. Ins. Co. v. Bell*, 166 Ill. 400; 57 Am. St. Rep. 140, and note; or where proofs are orally waived: *Burlington Ins. Co. v. Lowery*, 61 Ark. 108; 54 Am. St. Rep. 196, and note; or where the insurer by his own conduct leads the insured to believe that a performance of the condition is unnecessary: *Graves v. Merchants' etc. Ins. Co.*, 82 Iowa, 637; 31 Am. St. Rep. 507.

## ROYSTON v. HORNER.

[86 MARYLAND, 249.]

**RES JUDICATA—FAILURE TO INTERPOSE DEFENSE OF DURESS OR FRAUD.**—If a decree dismissing a bill is pleaded in a second suit as *res judicata*, and the party against whom it is so pleaded claims that it was procured by duress or fraud, he must assert that defense in reply, and after the decision that such first decree is *res judicata*, he cannot maintain a third suit for relief from it on the ground of fraud or duress, and that because of his failure to before plead it, it has not become *res judicata*. It was his duty to plead it in the second suit.

Richard S. Culbreth, for the appellant.

John Prentiss Poe and Edgar Allen Poe, for the appellee.

<sup>250</sup> FOWLER, J. On the 6th of April, 1888, John W. Royston filed his bill in the circuit court of Baltimore City against the same appellee against whom the bill in this case was filed by him and his committee. In the first bill he alleged his own imbecility and unfitness to attend to business; that he could be easily influenced; that whilst in this condition of mind he had been induced to sell to the appellee certain valuable property for an insignificant sum; that another and the appellee combined and conspired to cheat him; that they, through fraudulent statements and promises, induced him also to execute a deed to the appellee of all his contingent interests in the estates of his brothers and sisters which he would own in the event of their dying without issue. In the bill of 1888 Royston prayed that all these deeds might be set aside; that a receiver might be appointed to collect rents, etc. Answers were promptly filed by the appellee and his alleged coconspirators, and in January, 1889, the plaintiff began to take testimony and continued at intervals until the 15th of July of the same year. None appears to have been taken on his behalf thereafter. The defendants took no testimony whatever. The next step taken under the bill of 1888 was a decree dated August 28, 1889, which was passed with the consent of all the parties, that the bill be dismissed. Presently, when we have occasion to consider the facts set forth in the bill in this case it will fully appear what induced, or at least what is alleged to have induced, the parties to take this course. The bill of 1888 having been <sup>251</sup> thus dismissed, as appears by the evidence in this case, after a settlement of the controversy, the plaintiff named in the bill, John W. Royston, was, without any notice to him, not only found to be a lunatic at that time, but it was adjudged that he had been so for twenty years without



lucid intervals, and incapable of the management of his person or property. Campbell B. Royston was appointed the committee of his person and estate. In less than a month thereafter the bill which resulted in the appeal reported in *Royston v. Horner*, 75 Md. 559, was filed. In this last-named bill filed by the alleged lunatic and his committee, it is alleged that the various conveyances therein named, being the same mentioned in the bill of 1888, were made by said Royston when he was in an unsound condition of mind, and that the defendant Horner had within the short time he held and enjoyed the property so conveyed to him, received in rent the sum of four thousand three hundred and fifteen dollars or nearly three times as much as he had paid said Royston for it. And the prayer is that the deeds be set aside because of the lunacy of Royston, and that Horner may be required to account for the rents which he has received, and that a receiver may be appointed, etc. To this bill Horner pleaded *res adjudicata* based upon the consent decree of August 28, 1889. After a most careful and elaborate examination of the authorities and of the decree itself, we held in *Royston v. Horner*, 75 Md. 559, that that decree was a flat bar to the second bill, which, as we have seen, was the first attempt to get rid of the decree of 1889.

The bill in this case, which may be called the third of the series, and the second vain endeavor to avoid the binding force of the decree of 1889, was filed within a few months after the case of *Royston v. Horner*, 75 Md. 559, was decided. In the opinion in that case it is said that there was in the bill no allegation of fraud in obtaining the decree of 1889, and that without such allegation and proof, the decree must stand. Hence, in the bill now before us, the allegation on which the appellant bases his claim to be again heard is that the decree of 1889 was obtained by means of certain threats made to the sister of Royston to have him arrested on the charge of forging <sup>252</sup> certain promissory notes. It is to be noticed that it appears to be conceded that Royston had signed the names of the makers of the notes in question without authority. Claiming that these threats amount to fraud and imposition, the plaintiff again asks us to set aside the decree of 1889. But the plea of *res adjudicata* is again interposed as it was in the former case, and must, we think, again prevail as it did there. When, in the former case, the decree of 1889 was pleaded, the opportunity was presented to show what now is alleged to be true, namely, that that decree was obtained by duress or fraud. The alleged facts upon

which this allegation is founded were as well known to all the parties then as now. In the testimony of the able and distinguished counsel who, in part representing the plaintiffs, signed the agreement consenting to the decree of 1889, he says: "Miss Royston told me that Mr. Horner had threatened to prosecute her brother if the case was pressed"; and Miss Royston, to whom it is alleged the threats were made, shows very clearly in her testimony that she was fully informed, before the decree was passed, of the facts now alleged to constitute the fraud and imposition in obtaining it. She also communicated her knowledge to other members of the Royston family, and, indeed, the allegation in the bill now before us is that because these same threats were known to them, the sister who had charge of the litigation and all of them consented to the decree which is now assailed. But we repeat that if they had the information, and were aware of the facts now relied on, they should have alleged them in the former bill, or should have relied upon them for the purpose of replying to the plea of *res adjudicata*. This rule was applied recently in the case of *Wagoner v. Wagoner*, 76 Md. 313. We there said: "It will not do to say that the facts relied on in the second bill were not alleged in the first bill, and could not therefore have been proved in the first case, for the answer is, it was the appellant's duty to have either alleged and proved them in the first case, or to have shown in this case some good reason for failing so to do": *Henderson v. Henderson*, 3 <sup>253</sup> Hare, 115. And this rule extends not only to the questions of fact and of law which were decided in the former case, but also to the grounds of recovery or defense which might have been, but were not, presented: *Beloit v. Morgan*, 7 Wall. 622. Now it is manifest that if in the former suit it had been alleged in the bill and proved that the decree of 1889 had been obtained by the duress or fraud now relied on, it would have been set aside. And if no allegation to this effect was made, yet when the decree was pleaded, then was the time to demonstrate its invalidity by reason of fraud or duress or on any other ground available at that time: *Rouskulp v. Kershner*, 49 Md. 516. And it cannot be, as contended by the appellant, that simply because the first bill was not in form a bill to set aside the decree for fraud, and this is such a bill, that therefore the plea of *res adjudicata* does not apply. If this be so, ingenuity can easily destroy the efficiency and force of solemn adjudications settling the rights of contending parties. And not only so, if such a bill as this may be filed

row, it can be done at any time, for, as the appellant says, "the text-writers mention no limitation as to the time within which such an original bill may be filed."

The conclusion we have reached is in nowise in conflict with the numerous authorities cited to show that a decree obtained by duress or fraud is void and will be set aside. But having once had the opportunity to make this defense, and having failed to do so or to give any valid reasons or excuse for such failure, the rule must in this, as it has been in all similar cases, be rigidly applied. The plea of *res adjudicata* must prevail and the decree of August 28, 1889, must stand.

We may add that this conclusion which we have arrived at upon a consideration of the pleadings is all the more satisfactory to us, because it brings us to the same conclusion reached by the learned judge below on a full consideration of the facts—namely, that the bill must be dismissed.

Decree affirmed with costs.

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**RES JUDICATA.**—A judgment or decree of a court of competent jurisdiction is final, not only as to the subject matter, but also as to every other matter which the parties might have litigated and had decided in the case: *Hentig v. Redden*, 46 Kan. 231; 26 Am. St. Rep. 91, and note. If a party fails to plead or prove a fact which he might have pleaded and proved, or makes any other mistake during the progress of the action, this, while the judgment remains in force, cannot limit its effect: *Freeman v. McAninch*, 87 Tex. 132; 47 Am. St. Rep. 79, and note.

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## DUCKETT v. NATIONAL MECHANICS' BANK.

[86 MARYLAND, 400.]

**TRUSTS—LIABILITY OF THE TRUSTEE AND OTHERS FOR DISSIPATING FUNDS OF THE TRUST ESTATE.**—All persons knowingly participating in, or aiding in, committing a breach of a trust, or in the misapplication of trust funds, are equally liable with the trustee to make good the fund by returning it to the trust estate.

**BANKS—WHEN NOT ANSWERABLE FOR PAYING OUT MONEYS.**—Whenever moneys are placed on deposit, and neither the bank nor any of its officers are aware that such moneys do not belong to the person depositing them, it, by paying out the moneys on the depositor's check, frees itself from all liability therefor, though it turns out that they belong to another.

**BANKS—LIABILITY FOR MONEYS DEPOSITED BY ONE AS TRUSTEE.**—If moneys are deposited by one as trustee, he, as such trustee, has a right to withdraw them, and the bank, in the absence of notice to the contrary, is bound to assume, and is protected in assuming, that the trustee will appropriate the moneys, when drawn, to the proper use.



**A BANK IN WHICH MONEYS ARE DEPOSITED IN THE NAME OF A TRUSTEE** as such is under no obligation to look to the appropriation of moneys withdrawn by him, or to protect the trust by setting up the *ius tertii* against the demand.

**IF A BANK IN WHICH MONEYS ARE DEPOSITED IN THE NAME OF A TRUSTEE** as such, has knowledge that a breach of his trust is being committed by the improper withdrawal of such funds, or if it participates in the profits or fruits of any fraud upon the trust, it is answerable.

**BANKING—TRUST FUNDS—NOTICE THAT DEPOSIT CONSISTS OF—WHAT IS NOT.**—A check directing moneys to be paid to the credit of H. C., adding "being a balance of the purchase money due him as trustee for I. R. C.," is payable to him personally, and hence does not charge the bank in which it is deposited with notice that it represents trust funds, and that it is a breach of the trust to deposit it to the individual account of the trustee and to draw it out on his personal checks.

**A BANK IS NOT BOUND TO TAKE NOTICE** of memoranda or figures on the margin of a check which the depositor placed there for his own convenience to preserve information for his own benefit.

**BANKS—TRUST FUNDS, NOTICE OF—WHEN IMPARTED BY A CHECK.**—A check for a sum of money "to deposit to the credit of H. C., Trustee," notifies the bank that he is not the owner of the money, and instructs it not to place that money to his personal account, and if it does place the money to his personal credit and loss ensues, it is answerable. In the eye of the law it participates in the breach of the trust.

**BANKS—WHEN LIABLE FOR TRUST FUNDS IMPROPERLY WITHDRAWN.**—If a bank receives a check payable to a depositor as trustee, and credits it to his personal account and permits him to draw it out on his personal check, it is liable with him for a breach of the trust.

**STATUTE OF LIMITATIONS—TRUSTS.**—One who participates in a breach of a trust can no more than the trustee invoke the defense of the statute of limitations.

Marion Duckett, Charles H. Stanley, and Davis S. Briscoe, for the appellants.

James M. Ambler and Randolph Barton, Jr., and Barton & Wilmer, for the appellee.

<sup>401</sup> **McSHERRY, C. J.** These proceedings had their origin in a bill filed by the appellants against the appellees in the circuit court of Baltimore <sup>402</sup> City. The appellants are trustees who were appointed by an order of the circuit court for Prince George's county in the place and stead of Henry W. Clagett, the survivor of three trustees named in the will of John D. Bowling. To these latter—the testamentary trustees—certain funds were bequeathed by Mr. Bowling, to be held in trust for the purposes designated in the will; but as those purposes have no relation whatever to the questions presented in the record they need not be alluded to here. It is only necessary to state that

the funds now in controversy formed part of the corpus of that trust estate. Upon the death of his associates Clagett became, under a decree of the circuit court for Prince George's county, sole trustee, and thereafter, having made default to the trust estate, was in due course removed and the appellants were immediately appointed to discharge the trusts created by the will of Mr. Bowling. Amongst the investments belonging to the trust estate in the hands of Clagett were two mortgages, each for two thousand dollars, one due by Thomas S. Duckett and the other by Washington J. Beall. The mortgage given by Beall was foreclosed by Clagett after he became sole trustee, and the money realized from the sale was paid to him through Mr. Charles H. Stanley. The payment was made by Mr. Stanley's check, which reads as follows: "Laurel, Md., February 13, 1892. Citizens' National Bank. Pay to the order of James Scott, cashier, \$2,000.00, two thousand dollars, for deposit to credit of Henry W. Clagett, being the balance of purchase money due him as trustee from John R. Coale. C. H. Stanley." When the Duckett mortgage matured the amount secured by it was paid to Clagett through Mr. Stanley by a check in these words: "State of Maryland, Citizens' National Bank of Laurel, Laurel, Maryland. Sept. 17, 1892. Pay to the order of James Scott, cashier, \$2,024.30, two thousand and twenty-four 30-100 dollars, to deposit to the credit of Henry W. Clagett, trustee. C. H. Stanley." Both of these checks were deposited in the National Mechanics' Bank of Baltimore, where Clagett <sup>403</sup> kept an individual or personal account, and the proceeds of each were carried to his credit in that account. Clagett in his capacity as trustee had no account with the bank. The individual account of Clagett, including the proceeds of the two checks just transcribed, was drawn on from time to time by him, and after his removal as trustee it was discovered that these funds had been dissipated and spent. Clagett was and still is insolvent. The new trustees—the present appellants—made demand upon the National Mechanics' Bank for a restitution of the amount of the two checks, claiming that the bank was accountable therefor, because it had wrongfully placed the proceeds thereof to Clagett's individual account, instead of to his account as trustee, and had thereby aided and participated in his breach of trust; and to enforce that demand they filed the pending bill against the bank and Clagett. Upon final hearing the circuit court of Baltimore City decreed that the bank was not liable and dismissed the bill, whereupon this appeal was taken.

The ultimate inquiry is, whether under the circumstances stated the bank is liable to make good to the new trustees the amounts of these two checks. In addition there are subordinate questions arising by way of defense that will be disposed of after the main one has been dealt with.

There can be no dispute that, as a general principle, all persons who knowingly participate or aid in committing a breach of trust are responsible for the money, and may be compelled to replace the fund which they have been instrumental in diverting. Every violation by a trustee of a duty which equity lays upon him, whether willful and fraudulent or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust: 2 Pomeroy's Equity Jurisprudence, sec. 1079. There is in such instances no primary or secondary liability as respects the parties guilty of, or participating in, the breach of trust; because all are equally amenable. That a breach of trust was committed by Clagett does not admit of a doubt. The defaulting trustee was removed because he was a defaulter. He unquestionably received the <sup>404</sup> proceeds of these two checks, and those proceeds formed part of the corpus of the trust estate which it was his imperative duty to preserve intact. Instead of performing that duty he spent the funds—they have disappeared and he has not explained what he did with them—and it can make no possible difference for what purpose he did spend them, if by spending them he impaired the corpus of the trust estate; and that he did impair the corpus of the trust estate no one pretends to deny. Whoever knowingly aided him, or knowingly participated with him in misapplying that fund, became by reason of so aiding and so participating, equally liable with him to make the fund good by restoring it to the trust estate: 2 Pomeroy's Equity Jurisprudence, sec. 1079. If the bank knowingly aided and participated in Clagett's breach of trust, then the bank is, beyond dispute, as responsible to the new trustees as is the defaulting trustee himself. This liability of the bank depends, however, altogether upon the contingency that it knowingly aided the trustee, Clagett, to commit the default of which he was undeniably guilty. If without knowledge of Clagett's misconduct, or if without sufficient notice to put it on inquiry that would have enabled it to ascertain that Clagett was mingling with his individual deposits and using as his own, money that the bank knew or had the means of knowing was trust money; or if the bank was merely the innocent agency through which, without fault or negligence on its part, Clagett



depleted the trust estate, then it was not guilty of aiding him in misappropriating the trust fund, and is not liable to restore it. In seeking then, to solve the principal inquiry we must look to the record for the evidence which will fasten on the bank this knowledge or notice, if in fact it possessed such knowledge or notice.

At the outset it ought to be noted that there is a marked difference between the phraseology and the legal effect of the two checks already set forth. The one is payable to Scott, cashier, for deposit to the credit of Clagett personally—that is, not in his capacity as trustee—though there is <sup>405</sup> a memorandum added of which we will speak in a moment. The other check is payable to Scott, cashier, “to deposit to the credit of Henry W. Clagett, trustee.” Apart from these two checks, and the information which they themselves by their terms imparted, there is no pretense that the bank had any notice or knowledge that the funds collected on them belonged to or formed part of any trust estate, or were other than Clagett’s own, individual property. As a consequence we are restricted to the checks alone in determining whether the bank is liable.

It is true, undoubtedly, that a bank is bound to honor the checks of its customer so long as he has funds on deposit to his credit, unless such funds are intercepted by a garnishment or other like process, or are held under the bank’s right of setoff. It is equally true that whenever money is placed in bank on deposit, and the bank’s officers are unaware that the fund does not belong to the person depositing it, the bank, upon paying the fund out on the depositor’s check will be free from liability, even though it should afterward turn out that the fund in reality belonged to some one else than the individual who deposited it. It is immaterial, so far as respects the duty of the bank to the depositor, in what capacity the depositor holds or possesses the fund which he places on deposit. The obligation of the bank is simply to keep the fund safely and to return it to the proper person or to pay it to his order. If it be deposited by one as trustee, the depositor as trustee has the right to withdraw it, and the bank, in the absence of knowledge or notice to the contrary, would be bound to assume that the trustee would appropriate the money, when drawn, to a proper use. Any other rule would throw upon a bank the duty of inquiring as to the appropriation made of every fund deposited by a trustee or other like fiduciary; and the imposition of such a duty would practically put an end to the banking business, because no bank could possibly conduct

business if, without fault on its part, it were held accountable for the misconduct or malversation of its depositors who <sup>406</sup> occupy some fiduciary relation to the fund placed by them with the bank. In the absence of notice or knowledge a bank cannot question the right of its customer to withdraw funds, nor refuse (except in the instances already noted) to honor his demands by check; and, therefore, even though the deposit be to the customer's credit in trust, the bank is under no obligation to look after the appropriation of the trust funds when withdrawn, or to protect the trust by setting up a *jus tertii* against a demand. But if the bank has notice or knowledge that a breach of trust is being committed by an improper withdrawal of funds, or if it participates in the profits or fruits of the fraud, then it will be undoubtedly liable. In support of these general principles, if support they need at all, we may refer to *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333; 30 Am. St. Rep. 159; *State Nat. Bank v. Reilly*, 124 Ill. 464; *Chosen Freeholders v. Newark City Nat. Bank*, 48 N. J. Eq. 51, all cited in 3 Am. & Eng. Ency. of Law, 2d ed., 833, 834; *Walker v. Manhattan Bank*, 25 Fed. Rep. 255; 1 *Morse on Banks and Banking*, sec. 317; *Swift v. Williams*, 68 Md. 237.

As the bank, then, would not be responsible for the use made of the trust funds by the trustee, unless it knowingly participated in a breach of trust or profited by the fraud, Do the checks, which are, as we have said, the only evidence in the record on this branch of the case, show that the bank is liable? As respects the first check representing the proceeds of the foreclosure of the Beall mortgage, we are of opinion that there is no liability on the part of the bank. It will be remembered that this particular check was not made payable to Clagett, as trustee, nor, being payable to Scott, cashier, were the proceeds directed to be placed to the credit of Clagett, trustee. In placing the proceeds to the individual credit of Clagett, the bank did just precisely the thing it was directed on the face of the check to do. In doing this it violated no duty to any one, unless the addition of the words "being the balance of purchase money due him as trustee from John R. Coale," controlled the explicit direction <sup>407</sup> in the body of the check to deposit the fund to the credit of Clagett individually, and gave the bank notice that instead of doing what the check required should be done it must do something it was not instructed to do at all; viz., place the funds to the credit of Clagett as trustee. Mr. Stanley's check was drawn, not on the National Mechanics' Bank, but upon the

Citizens' National Bank of Laurel; and the memorandum descriptive of what the funds were or the source from whence they came, was neither an instruction to the Mechanics' bank through which the check passed as to the account in which these funds when collected from the Citizens' bank should be credited in the Mechanics' bank to Clagett; nor was it a notification to the Mechanics' bank that the funds were impressed with a trust that would be invaded by their being carried to Clagett's individual credit. On the contrary, the specific instruction on the face of the check was to credit Clagett individually with the proceeds, whatever the origin or ultimate use of those proceeds might be. This memorandum imposed no duty on the Mechanics' bank, and operated only to subserve the convenience of the drawer of the check. In the case of *State Nat. Bank v. Dodge*, 124 U. S. 333, it appeared that the clerk of the United States district court for the southern district of Illinois deposited with the State National Bank the funds belonging to the registry of the court. Whenever a deposit was made it was accompanied by a deposit ticket giving the number of the bankruptcy case to which the fund belonged, and a corresponding entry was made upon the books of the bank indicating that the particular deposit belonged to a particular case designated by its number. All this was fully understood by the officers of the bank. When checks signed by the clerk and countersigned by the judge were drawn upon this account, the number of the case to which the fund to be paid on the check belonged, was written on the upper right-hand corner of the check following the words "Case No." Numerous deposits were made in many cases, but each and every deposit showed the <sup>408</sup> number of the case, and consequently identified the case, to which each deposit actually belonged. Many checks were drawn upon and paid by the bank in cases in which no deposits had been made by the clerk at all, and the checks themselves showed by the case numbers written on the top right-hand corners that no deposits belonging to those cases had ever been received, because there were no deposits credited to the cases bearing those numbers. In consequence of the bank having paid various checks bearing case numbers, to the credit of which cases no deposits had ever been made, the entire sum to the credit of the whole account was checked out before Dodge, to whom several checks were given in the distribution of the assets of a particular estate, received his checks and presented them to the bank for payment. In the case in which Dodge was interested as a creditor of a bank-



rupt, there had been deposited, as shown by the deposit tickets and by the entry of the case number on the bank's books, more than sufficient to pay the checks held by Dodge, as well as all other checks delivered to other creditors of the same bankrupt; but because the bank had paid out the funds belonging to this case, on checks bearing the numbers of other and different cases, as to which latter cases there had been no deposits made at all, there were no funds in bank to the credit of the registry with which to pay the checks held by Dodge, and the bank refused to pay them. Dodge brought suit against the bank and based his claim to recover on the distinct ground that the bank had actual notice from its own books as to what estates had funds on deposit, and had actual notice on the face of every check drawn in a case from which no funds had been received, that there were no funds on deposit applicable to the payment of such checks, and that, consequently, when it paid those checks it paid them knowingly out of funds belonging to other and different cases or estates, and was bound to honor the checks held by Dodge, as they were drawn against funds which had been actually deposited as part of the assets of the bankrupt estate of which he <sup>400</sup> was creditor. But the supreme court held that "no bank is bound to take notice of memoranda and figures upon the margin of a check, which a depositor places there merely for his own convenience, to preserve information for his own benefit; and in such case the memoranda and figures are not a notice to the bank that a particular check is to be paid only from a particular fund. So, too, a mark on a deposit ticket, if intended to require a particular deposit to be kept separate from all other deposits placed to the credit of the same depositor, must be in the shape of a plain direction, if such a duty is to be imposed on the bank." The court likewise held that "the bank had a right to assume that these memoranda of numbers in the deposits and in the checks were merely for the convenience of the court and its officers." Dodge was accordingly denied a recovery.

Unless we give to the memorandum made by Mr. Stanley for his own convenience on the first check, an effect which the supreme court declined to give to a much more significant memorandum contained in the checks delivered to Dodge, we must hold that the Mechanics' bank, by carrying to the personal credit of Clagett the proceeds of the check representing the avails of the Beall foreclosure, did no act that made it liable to the Bowling trust estate for the misappropriation of those particular proceeds by the deposed trustee. And this is so because

the memorandum could not operate to qualify the right of Claggett to receive the funds individually, and the bank did no wrong in placing them to his credit in the capacity in which he was obviously authorized to receive them. The bank having therefore rightfully entered the proceeds of this first check to Claggett's individual credit, he was entitled to draw them out so far as the bank was concerned, and the bank was under no obligation and had no authority to interfere with him in doing so.

Precisely for the reasons that the bank is not responsible for the misappropriation of the proceeds of the first check, it is liable to the new trustees for the misapplication by Claggett of the funds collected by it on the second check. The <sup>410</sup> second or Duckett check, in terms directed the cashier of the Mechanics' bank "to deposit" the two thousand and twenty-four dollars and thirty cents "to the credit of Henry W. Claggett, trustee." This was an explicit notification to the bank that Claggett was not the actual owner of the money: *Bundy v. Monticello*, 84 Ind. 119; 3 Am. & Eng. Ency. of Law, 2d ed., 832. It was an equally explicit instruction to the bank not to place the funds to the credit of Claggett's personal account. It was consequently more than a mere memorandum made for the convenience of the drawer of the check. Knowing that the money was not Claggett's but that it was payable to him and to be deposited to his credit as trustee, the bank had no authority to place it to his individual credit (*American Ex. Bank v. Loretta Min. Co.*, 165 Ill. 109; 56 Am. St. Rep. 236); and if loss ensued by reason of Claggett drawing the fund out by checks on his personal account, the bank is liable to make restitution to the trust estate. The bank in the eye of the law participated in the breach of trust of which Claggett was guilty. In fact the bank took the first step that ended in the spoliation of the trust. Its act in placing distinctly marked trust funds to the personal credit of Claggett was obviously wrongful, and it must bear the resulting consequences. It is no answer to say that had the bank obeyed the direction given to it, and had it opened an account in the name of Claggett as trustee, and credited that account with these funds, still Claggett could have withdrawn them on checks appropriately signed, and could then have misapplied the money without involving the bank in any liability. This is no answer, simply because what might have been done was not done. Had the bank opened the account for this fund in the name of Claggett, trustee, instead of entering the credit to his personal account it would have done what it was its plain duty to do, and it would not have

been guilty of the error which it did commit. Had it done its duty, and had Clagett afterward withdrawn the money, as he might have done, and had he then misapplied it without the co-operation of the bank there would have been no liability <sup>411</sup> incurred by the bank at all. But this was not done, and the failure of the bank to do what it ought to have done cannot be treated as tantamount to the thing that it did do, unless contraries are equivalents of each other. What it ought to have done is not what it did do, and it cannot escape liability upon the mere conjecture that what did happen to the funds might have also happened had the bank not been derelict in its dealings with those funds.

It has, however, been insisted that Clagett knowing that the bank had wrongfully placed trust funds to his individual credit, ratified that wrongful act by his subsequent conduct, and as his ratification was equivalent to a prior direction to do what was done, the bank is not answerable. Both Clagett and the bank participated in the wrong with respect to the proceeds of the Duckett mortgage. Because they both did wrong they are both accountable for it. But the contention is, if one of two wrongdoers who reap the fruits of the joint wrongful act, ratifies what his accomplice has done, that accomplice is thereby released and exculpated. This, of course, is not the bald form in which the rather ingenious argument advanced to support the contention is presented, but reduced to its last analysis it comes to that startling proposition. The wrong was done, not to the trustee, but to the trust estate. As between the bank and the trustee his ratification of its act might bind him, but upon what principle can such a ratification bind the beneficiaries of the trust, who have been injured by the joint breach of trust on the part of the bank and the trustee? No ratification by the trustee of the bank's participation in the breach of trust can possibly affect in any way the bank's accountability to the new trustees.

As to the statute of limitations it is only necessary to say that a participant in a breach of trust cannot, any more than can the trustee himself, invoke that defense: 2 Pomeroy's Equity Jurisprudence, sec. 1080. Even if the statute applied, to be availed of as a defense it must be invoked by either a plea or an answer: *Allender v. Vestry Trinity Church*, 3 Gill, 166. The <sup>412</sup> answer of the bank relies on limitations only as against the claim for two thousand dollars, which is not the claim for the two thousand and twenty-four dollars and thirty cents collected on the check given in payment of the Duckett mortgage debt—



and that is the claim for which we hold the bank liable. So in fact the statute is pleaded against the claim that the bank is not liable for, and is not pleaded against the claim for which it is responsible.

We have made no allusion to a line of cases of which *Third Nat. Bank v. Lange*, 51 Md. 138; 34 Am. Rep. 304; *Marbury v. Ehlen*, 72 Md. 206; 20 Am. St. Rep. 467, and *Stewart v. Firemen's Ins. Co.*, 53 Md. 564, are illustrations; because the principles applied in that group of decisions have no relation to the questions involved on the record now before us. The sale of a promissory note payable to a trustee—and therefore a non-negotiable note—or the transfer of a certificate of stock standing in the name of an individual as trustee, is quite a different thing from the payment of a check drawn by a trustee on an account standing to his credit as trustee in a bank. Where certificates of stock are held in trust, and on their face indicate that they are so held, the bank or other corporation is bound, before suffering them to be transferred on the books of the corporation, to know, or at least to use proper diligence to ascertain, that the trustee has authority to make the transfer; whereas, in the case of a deposit, the relation of debtor and creditor is created in the capacity in which the deposit is made, and the bank's duty is to pay out the fund to or upon the order of the person making the deposit when the check is properly signed, without looking to the application of the fund; and it incurs no responsibility by so doing, unless it knowingly participates in a breach of trust or itself reaps the fruit thereof.

We hold, then, on the entire case, that the bank is accountable for the sum of two thousand and twenty-four dollars and thirty cents—the amount of the check dated September 17, 1892—with interest thereon from the date of the deposit of the proceeds to the credit of Clagett's individual <sup>413</sup> account; and that it is not liable for the proceeds of the other check.

The decree dismissing the bill of complaint will accordingly be reversed, and the cause will be remanded that a new decree may be passed conforming to this opinion.

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**TRUSTS—LIABILITY OF PERSONS PARTICIPATING IN TRUSTEE'S DEALINGS WITH TRUST PROPERTY.**—One coming into possession of trust property with notice of the trust shall be bound as a trustee: *Lathrop v. Bampton*, 31 Cal. 17; 89 Am. Dec. 141, and note; *Carpenter v. McBride*, 3 Fla. 292; 52 Am. Dec. 379, and note. See monographic note to *Tyler v. Herring*, 19 Am. St. Rep. 266, 277.

**BANKS DEALING WITH TRUSTEES—DUTIES AND LIABILITIES.**—Persons dealing with trustees must take notice of the scope

of their authority: *Kirsch v. Tozler*, 143 N. Y. 390; 42 Am. St. Rep. 729, and note. When an account is opened with a bank by a depositor as trustee, the contract of the bank is that it will pay out the same on the checks of the depositor, and when such checks are drawn in proper form, the bank is bound to presume that they are drawn in the proper discharge of the duty of the trustee, and to honor them accordingly: *Note to Munnerlyn v. Augusta Sav. Bank*, 30 Am. St. Rep. 163. But where a bank knowingly participates with such depositor in a misapplication of trust funds, it will be held liable to the beneficiary for any wrong thus done him. The test as to whether a bank had notice of the trustee's unlawful purpose in a given case is that laid down by the ordinary rules of notice. Anything which raises the duty to make an inquiry, which inquiry, if properly made, would reveal the unlawfulness of the trustee's purpose, is sufficient as constructive notice: See monographic note to *Day v. Brenton*, ante, p. 460. See *Marbury v. Ehlin*, 72 Md. 206; 20 Am. St. Rep. 467, and note.

**TRUSTS—STATUTES OF LIMITATION AS APPLIED TO.**—Subsisting, direct, and acknowledged trusts, cognizable only in equity, are not subject to the limitations prescribed in the statute as between the trustees and the cestui que trust: *Monographic note to Frame v. Kenny*, 12 Am. Dec. 372, 373. Where one borrowed money, knowing it to be trust money, it was held that he could not plead the statute in bar to a suit for recovery of the debt: *Monographic note to Miles v. Thorne*, 99 Am. Dec. 399.

## FRANKLIN SUGAR REFINING COMPANY v. HENDERSON.

[86 MARYLAND, 452.]

**PARTNERSHIP—WHAT DISPOSITION OF PROPERTY OF IS A FRAUD ON FIRM CREDITORS.**—Every act of partners which is destructive of the right of the firm creditors to have the partnership assets applied to the satisfaction of their demands, and which, as a result, hinders, delays, and interferes with the assertion of this right, is, by operation of law, a fraud upon them if the partnership is insolvent.

**PARTNERSHIP—TRANSFERS IN FRAUD OF CREDITORS OF.**—The conversion of the property of a partnership into separate property of its members, or of some of them, when it is insolvent, is a fraud upon the firm creditors.

**PARTNERSHIP—TRANSFER BY ONE PARTNER TO THE OTHERS—WHEN A FRAUD UPON CREDITORS.**—The transfer by one member of an insolvent partnership to the others of his interest in the firm must be treated as a fraud upon the firm creditors, because, if permitted to operate against them, it deprives them of the right to have the firm property applied to the satisfaction of its liabilities.

**INSOLVENCY—INFERENCE OF PRIOR FROM SUBSEQUENT.**—If a partner transfers all his interest in a firm to his co-partners, and ten days later, without any loss being shown during that time, and without any new cause other than the demand of some of the old firm creditors for the payment of their debts, the new firm collapses and is found insolvent, the presumption arises that the insolvency on the part of the old firm existed at the time the member withdrew.

**PARTNERSHIP — ASSIGNMENT OR TRUST DEED — WHEN VOID AS AGAINST FIRM CREDITORS.**—If one of three

members of an insolvent corporation withdraws therefrom, transferring all his interest to the others, who form a new partnership, and, after doing business a few days, the members of the new firm execute an assignment or trust deed for the benefit of its and their creditors, including therein all the assets received from the old firm, such deed or assignment is fraudulent as against creditors of the old firm, and hence both it and the transfer made by the retiring member will be disregarded, and the assets of the old firm held to be subject to the satisfaction of its liabilities.

Frank Gosnell and William S. Bryan, Jr., and James W. McElroy, for the appellants.

Alfred S. Niles and Oscar Wolff, for the appellees.

**455** McSHERRY, C. J. These four cases come up from a pro forma order quashing attachments sued out by the appellants against the appellees, Henderson, Pfeil and Company. In November, 1892, John B. Henderson, George Henry Pfeil, and Alexander J. McDonald formed a copartnership which carried on business in Baltimore City until October 4, 1895. On that day the copartnership was dissolved. It was indebted at the time to sundry persons, but whether it was insolvent or not is one of the controverted issues of fact that will be considered later on. Henderson sold his interest in the concern to his associates, and assigned and made over to them all of his right and title, as a member of the firm, in and to the property and assets of every kind, real, personal, and mixed, owned by the copartnership. Notice of dissolution was given, and Pfeil and McDonald at once formed a new firm under the old name. Just ten days afterward—that is, on the fourteenth day of October, 1895—Pfeil and McDonald executed a deed of **456** trust to Oscar Wolff, Esq. The deed was made by “George H. Pfeil and Alexander J. McDonald, trading as Henderson, Pfeil and Company,” and is not signed by Henderson. It recites that “the parties of the first part,” that is Pfeil and McDonald, “are indebted to divers persons and firms in various sums of money, and have become and are unable to pay such indebtedness in full; and that, “in order to have their assets and effects collected and faithfully applied to the payment of their said debts” (that is, the debts due by the grantors) the assignment was made. After making provision for the payment of costs and commissions and such preferences as the law creates, the deed proceeds to declare that the trustee shall apply the “proceeds of the joint stock of the said copartnership”—that is, the copartnership of which Henderson was not a member—to pay the creditors of the copartnership, that is, the copartnership composed of Pfeil



and McDonald, "and to appropriate the net proceeds of the separate estate of each partner to pay his separate creditors," and the surplus of each partner's separate estate after the payment of his individual creditors is directed to be added to the social assets, and the surplus, if any, of the partnership assets is directed to be divided between the partners in the proportions of their respective interests, and to be applied to the payment of their separate debts. It is important to observe that the deed of assignment makes no reference whatever to the old firm of which Henderson had been a member, and contains no provision, in terms or by implication, for the payment of the creditors of that firm out of the assets owned by it on October 4th, the day of its dissolution.

On October 15th—the day following the execution and recording of the deed of trust—the appellants, who are creditors of the old firm of Henderson, Pfeil and Company, sued out of the superior court of Baltimore City, attachments which they caused to be laid in the hands of Mr. Wolff as garnishee. They allege, as one of the grounds upon which the attachments are founded, that Henderson, <sup>457</sup> Pfeil, and McDonald, have assigned, disposed of, or concealed or are about to assign, dispose of, or conceal their property, or some part thereof, with intent to defraud their creditors. The garnishee appeared, pleaded *nulla bona*, and filed a motion to quash, founded on the claim that the property and assets attached were the property and assets of Mr. Wolff, the trustee, and not of the defendants. The motion was heard and the learned judge at large was of opinion that the motion to quash ought to be overruled; but by an agreement made between the parties a *pro forma* order was signed overruling the motion and finally quashing the attachments. From this *pro forma* order the pending appeals were taken.

A reversal is claimed upon two grounds, and these are: 1. That the deed of trust to Mr. Wolff is fraudulent in law as hindering and delaying the creditors of the old firm; and 2. That the deed is fraudulent in fact.

We may as well dispose of the second ground first, because but little need be said respecting it. The record has been minutely read and carefully considered, and we all agree that it furnishes not the slightest warrant for impeaching the deed on account of actual fraud. The conduct of Mr. Wolff throughout is free from the faintest shade of bad faith. There is nothing to suggest even a suspicion that he was not actuated by the very highest and most honorable motives and intentions; and there is no

evidence whatever that can be tortured into an imputation of bad faith. We are thoroughly convinced that the trustee acted in the utmost good faith; and we accordingly dismiss this branch of the case without further comment, and turn, at once, to the consideration of the other.

Partnership creditors have no lien on partnership assets, but the partners themselves have a right to insist upon the appropriation of the joint property to the payment of joint debts, upon the principle that as the joint debts were contracted in making the purchases of the joint assets, the latter ought primarily to be charged with the burden of paying the <sup>458</sup> former. The right of the partners to have the joint debts paid out of the joint assets in preference to the right of the separate creditors to be paid out of the same assets, gives rise to the derivative equity of the joint creditors to have payment of their claims out of the proceeds of the copartnership property before any of those proceeds can be devoted, either to the separate use or appropriated to the payment of the separate debts of any of the members of the firm. The derivative right is the right of the creditor—it belongs to him—and the partners have, if insolvent, no power or authority to destroy or impair it to his injury or prejudice. This is so in the very nature of things. Any act, therefore, of the partners which is destructive of this right of the creditor and which, as a result, hinders, delays, and interferes with his assertion of it and impedes his ability to realize, through its enforcement, the payment of the debt due to him by the firm, is, by operation of law, a fraud upon the creditor, if the copartnership is itself insolvent. This principle has been often applied. In a number of cases it has been held, and it may certainly be regarded as the law of Maryland to-day, that the conversion of the firm's assets into individual assets by an assignment from one partner of all his interest in the concern to another, works a conversion of the property from joint to separate property, and when the firm is insolvent, operates to hinder, delay, and defraud the firm's creditors, if the transfer be permitted to stand. It is obvious that this must be so. As the creditor's preference or priority to be paid out of the joint property can only be worked out through the partner's right to have that property applied in the first instance, to the payment of the firm's creditors; and as the individual creditors have a prior right to require that the separate estate shall be first applied to the satisfaction of the individual debts, it necessarily follows that the conversion of the joint property into separate

property, if sustained, would, when the firm and its members are insolvent, destroy the right of the partnership creditors to a preference over the creditors of the <sup>459</sup> individual partner to whom the assets had been transferred; because, when the assets cease to be joint assets, the right of the partner to have them applied to the payment of partnership debts is gone, and when that right is gone the derivative right of the firm's creditor is extinguished. This being the consequence of such a transfer of the assets, the transfer itself, when the firm is insolvent, is inhibited and is deemed ineffectual to convert the joint property into separate property as against the firm's creditors: *Collier v. Hanna*, 71 Md. 261; *Darby v. Gilligan*, 33 W. Va. 249; 6 L. R. A. 740, and notes.

Whilst this principle is not denied as being applicable to a case where a transfer has been attempted by one or more partners to another singly, it is insisted that it has no relation to a case where the transfer has been made by a retiring partner to two or more of his copartners who continue business; and the reason assigned is that the joint assets are not, by such a transfer, converted into separate assets, but remain the joint property of the copartners to whom they are transferred. The difference in the facts does not produce a difference in the result, so far as respects the creditors. By the express agreement of the three partners, and by the withdrawal of Henderson from the firm, the copartnership of Henderson, Pfeil and Company was dissolved at the close of business on the fourth day of October, 1895. The new copartnership was at once formed, and under the transfer from Henderson assumed to acquire all his rights and title to the old firm's property. The transfer of the old firm's whole assets to the new firm, if valid, as effectually precluded the old firm's creditors from asserting their derivative right through the equity of the old firm's members as though the assets had been converted into the separate assets of one member; because, whilst in the latter instance the right would have been lost by reason of the separate creditors being preferred, in the other instance the old firm's creditors' right would have been lost by being either subordinated to the claims of <sup>460</sup> the new firm's creditors, or by being placed on an equal footing with it: 17 Am. & Eng. Ency. of Law, 978, 979, notes 1, 2, 3; *Huiskamp v. Moline Wagon Co.*, 121 U. S. 310.

It is not solely because the transfer by one to another partner converts the joint into separate property that such a transfer is, when the firm is insolvent, prohibited as against the joint cred-



itors; but it is because by such a conversion, if effective, the equity of the joint creditors to have a priority through the lien of the partners would be destroyed. The destruction of this lien and the consequent extinguishment of the creditor's derivative equity, is the injurious act—it is the detrimental end; the transfer itself is merely the means by which that end is accomplished. The law levels its inhibition at the means, merely because the end worked out by those means is injurious. The results are the things with which it is chiefly concerned. If the equity of the joint creditor is destroyed by a transfer that does not convert joint into separate property, the result to the creditor is precisely the same as though the joint had been converted into separate assets; and it will not do to say that the right of the creditor to relief depends on the manner in which the means employed to defeat him may produce their result, rather than on the ultimate fact that he has in reality been defeated by those means. And so whilst a transfer of all his interest by one to two other members of an insolvent firm may not convert what was joint into separate property, it nevertheless does, if effective at all, by divesting that property out of the old and vesting it in the new firm, as completely defeat the equity of the old firm's creditors and subordinate that equity to the equity of the creditors of the new firm, or place the equity of the latter on an equality with that of the former.

We have just said that the transfer by one to two other members of an insolvent firm conveying the retiring partner's interest in the joint property, if effective at all as against the creditors of the firm, is prejudicial to their <sup>461</sup> equity. But is such a transfer any more effective when assailed than the transfer from one or more to another member of such a firm would be? In *Collier v. Hanna*, 71 Md. 261, we held that a transfer from one to another member of an insolvent firm cannot be upheld against the firm's creditors, and precisely the same conclusion must be reached in the other instance. Thus in *Peyser v. Myers*, 135 N. Y. 599, there were two sets of creditors, there was a change in the firm, and in discussing the respective rights of these creditors the court said: "The priority of the lien of firm creditors is not divested by a transfer by an insolvent firm of the firm assets to one or more of the partners, nor can it be effected, as we conceive, by any mere change in the personnel of the firm, as by the withdrawal of one partner from the firm or the introduction of a new member": See, also, *Phelps v. McNeely*, 66 Mo.

554; 27 Am. Rep. 378; Thayer v. Humphrey, 91 Wis. 276; 51 Am. St. Rep. 887.

It was said in the argument that no case could be found where the doctrine announced in *Collier v. Hanna*, 71 Md. 261, had been applied to the state of facts presented by this record—that is, where a retiring partner had transferred his interest in the social assets to two or more remaining members of the firm. But it is not material whether a parallel case can be cited or not—we are not dealing with precedents, but with principles; and if the legal principle underlying the one state of facts is applicable to and fits the other state of facts, the mere circumstance that no adjudged case actually applying such principle can be produced, furnishes no reason for refusing to make the application when the occasion does arise. But the case of *Peyser v. Myers*, 135 N. Y. 599, distinctly recognizes the doctrine as applicable to such a case as this.

This brings us to the deed of trust, and in the light of what has been just stated we are to determine whether its legal effect is to hinder and delay the creditors of the old firm, and whether therefore, it is in law fraudulent and invalid as to those creditors. The whole discussion thus far has proceeded upon the theory that the firm of Henderson, <sup>462</sup> Pfeil and Company was insolvent on October 4, 1895; and what we have said must be understood in that view; and as the ultimate decision of these cases hinges on the question of solvency, we now proceed to consider that question before examining the terms of the deed of trust.

Henderson retired from the old firm on Friday, October 4th. The new firm took charge at the close of business on that day. They continued in business until Monday the 14th, when the deed of trust was made. Excluding the two intervening Sundays—the 6th and the 13th—they conducted the business for just seven days. On Saturday the 12th of October—the last of those seven days—the new firm was, as a matter of fact, no worse off financially than it had been on the preceding 4th of the same month. This is distinctly stated in the evidence of Pfeil and nowhere controverted. On the 14th, when the deed of trust was executed, the firm's financial condition had not changed from what it was the prior Saturday. As its condition on the 14th was no worse financially than on the 4th, if it was insolvent on the 14th it could not have been solvent on the 4th. That it was insolvent on the 14th is abundantly evident from the recitals in the deed itself, and from the statement of its liabilities and

assets furnished by the trustee to the creditors. Its liabilities on the 14th were over fifty-six thousand dollars; and its actual assets were something over thirty-one thousand dollars—which were afterward swelled some five thousand dollars by book accounts collected, but were diminished in the neighborhood of three thousand dollars by a sale of the plant at less than the estimated value. Its liabilities were far in excess of its assets when the assignment to Mr. Wolff was made, and it was no worse off financially then than when Henderson withdrew ten days previously. Its collapse in seven business days with no cause existing to produce that result other than the demand of some of the old firm's creditors for the payment of overdue <sup>463</sup> debts, conclusively shows that it was utterly insolvent—unable to pay its debts when due and demandable—at the time Henderson retired; especially as at the time the deed was executed the firm was confessedly no worse off financially than it had been on October 4th. We are convinced, then, that both the old and the new firms were insolvent on October 4th.

The deed of trust, as we have seen, was signed only by Pfeil and McDonald and made provision solely for the payment of the debts due by the copartnership composed of those two individuals. The quotations we have made from the deed are quite sufficient to show this conclusively. The deed thus undertakes to treat the assets which the trustee claims under it—and they are largely the assets which belonged to the old firm—as the property of the new firm; and it further undertakes to appropriate those assets to the payment of the new firm's debts without the slightest regard to the rights of the creditors of the old firm who are not creditors of the new concern. Had the transfer by Henderson been made by himself and by one other member of the firm to the remaining member, the firm itself being insolvent, and had the purchasing member executed a deed of trust providing for the payment of his debts, the deed would, under these circumstances, have been invalid: *Collier v. Hanna*, 71 Md. 261; *Gable v. Williams*, 59 Md. 53. For the reasons we have already suggested, the mere fact that the transfer by Henderson was made to two members of the old firm, does not rescue the deed from condemnation. The deed entirely ignores, and if effect were given to it, it would utterly destroy, the privilege or preference to which the creditors of the old firm are entitled, of having the debts due to them paid out of the assets of the old firm; and it would destroy this preference, notwithstanding no transfer by any member of an insolvent firm to the other mem-



bers thereof can be efficacious to defeat the rights of such creditors. The deed expressly dedicates the property conveyed by it to the payment of the creditors of <sup>464</sup> the grantors. This, Pfeil and McDonald had no right to do. The insolvency of the old firm at the time of Henderson's attempted transfer of his interest therein to his copartners prevented that transfer from becoming effective as against the right of the creditors of Henderson, Pfeil and Company to work out their equities through the lien of the partners, and, therefore, did not vest the title in the remaining partners as a bona fide sale by a partner of a solvent concern would have done. The transfer by Henderson to Pfeil and McDonald did not clothe the latter with a title which they could by a deed of trust convey for the benefit of their creditors alone; and consequently the deed of trust, which, by its terms, excludes the creditors of the old firm, is a conveyance that hinders, delays, and defrauds those creditors. The deed is, and can therefore be, no barrier to the condemnation of the credits attached in the hands of the trustee.

The pro forma order quashing the attachments will be reversed and the cases will be remanded for further proceedings; and it is accordingly so ordered.

Pro forma order reversed and cases remanded, the costs to be paid out of the trust estate.

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**PARTNERSHIP—TRANSACTIONS OF, FRAUDULENT AS TO CREDITORS.**—Transfer to one partner by the others of all the partnership property in consideration of his assumption of the partnership liabilities, when all knew that the firm and each of its members were insolvent, and could not meet his or their mutual obligations, cannot defeat the right of the firm creditors to have their demands satisfied out of such property before any of it shall be applied to the payment of the debts of the partner to whom the transfer was made, because from such transfer a common intent to hinder, delay, and defraud creditors must be inferred, and furthermore the transfer must be regarded as voluntary: *Arnold v. Hagerman*, 45 N. J. Eq. 186; 14 Am. St. Rep. 712; extended note to *Smith v. Smith*, 43 Am. St. Rep. 375.

**INSOLVENCY — EVIDENCE OF — WHEN SUFFICIENT.** — If, within six months after the dissolution of a partnership and the retirement of a member therefrom, it appears that those remaining in the business failed, owing seven hundred thousand dollars, of which nearly one-half was unsecured, that the assets were not sufficient to meet more than one-half of the unsecured obligations, and that there had not been any considerable shrinkage in values, or other losses, during this time, a court or jury is justified in finding that the partnership was insolvent at the time of such dissolution: *Baily v. Hornthal*, 154 N. Y. 648; 61 Am. St. Rep. 645.

**PARTNERSHIP—ASSIGNMENT FOR BENEFIT OF CREDITORS—WHEN VOID.**—If one of two insolvent partners transfers all his interest in the partnership assets to his copartner, who, on

the same day, assigns for the benefit of creditors, no provision being made for the application of the partnership assets to the payment, in the first instance, of partnership creditors, such assignment is fraudulent at law and void as to partnership creditors: Monographic note to Bank of Little Rock v. Frank, 58 Am. St. Rep. 92. Compare with the principal case, Thayer v. Humphrey, 91 Wis. 276; 51 Am. St. Rep. 887, and note.

## SUSQUEHANNA FERTILIZER COMPANY v. SPANGLER.

[86 MARYLAND, 562.]

**NUISANCE—LAWFUL BUSINESS—CARE AND SKILL.**—If a lawful business is so carried on as to constitute a nuisance, the right of the person injured thereby to recover cannot be defeated by proving that the defendant used care and skill and employed the most approved appliances in the management of his works.

**NUISANCE—LOCALITY IN WHICH BUSINESS IS CONDUCTED.**—If the operation of a factory interferes with the reasonable and comfortable enjoyment by the plaintiffs of the property, or occasions material injury thereto, they are entitled to relief irrespective of the locality of their property. The fact that the neighborhood is one in which factories are situated and in which other nuisances abound, does not entitle the defendant to exemption from liability, if the plaintiffs have suffered by the interference of the defendant's works with the reasonable and comfortable enjoyment of their property.

**NUISANCE—WHAT PROPERTY OWNER MUST SUBMIT TO IN BUSINESS OR MANUFACTURING DISTRICT.**—If a man lives in a town where necessary trades are carried on in his neighborhood, he has no ground for complaint if they are carried on in a careful and reasonable manner, though somewhat to his discomfort, but he is not bound to submit to all discomforts and annoyances which may arise even from a useful and lawful business conducted with skill and approved appliances. He cannot be required to submit to smoke, smells, noise, vapors, water, or any gas or fluid to such an extent as to interfere with the ordinary comforts of human existence, or the immediate result of which is sensible injury to the value of his property.

Charles Marshall and Edgar H. Gans, for the appellant.

R. R. Boarman and Robert Riddell Brown, for the appellees.

**566** BRYAN, J. Andrew Spangler and his wife brought an action against the Susquehanna Fertilizer Company to recover damages caused by an alleged nuisance. Judgment having been rendered in their favor, the defendant appealed.

The declaration averred that the plaintiffs were owners of two lots of ground on each of which there was a dwelling-house; that the plaintiffs and their family lived in one of the dwelling-houses, and kept a store in it, and that the other is rented to tenants from time to time; and that the defendant conducted and maintained a factory for the manufacture of fertilizers, phos-

phates, manures, and compounds; and that from said factory from time to time there arose noxious, noisome, offensive, and unwholesome vapors, smoke, and foul and disagreeable odors, and noxious gases, and were spread and diffused over and upon the lots of the plaintiffs, and upon and into the dwelling-houses erected on said lots, and caused great discomfort and annoyance and sickness to the plaintiffs and their family, and destroyed their furniture, bedclothes, and wearing apparel, and greatly corrupted and polluted the air, and rendered it deleterious to the health of the plaintiffs and their family, and took away from them the reasonable and comfortable enjoyment of the houses as places of abode, and greatly impaired and diminished the value of the dwelling-houses, and the value of the store as a place of business. The defendant pleaded that it did not commit the wrong alleged.

The houses alleged to belong to the plaintiffs, and the factory of the defendant, are situated in Canton, a large and populous village adjoining the city of Baltimore. The evidence showed that one of the lots was owned by the plaintiffs. This lot is at the corner of First street and Eighth avenue. There is no testimony in the record as to the other lot, which adjoins the first one. The evidence for the plaintiffs tended to prove the other facts averred in the declaration. The evidence for the defendant contradicted them, and also tended to show that with the exception of a few <sup>567</sup> houses, the entire locality where the nuisance is alleged to exist is given up to fertilizer factories, wharves, elevators, and a railroad, and that the Spangler property is in close proximity to large hogpens and manurepits. The court granted two prayers in behalf of the plaintiffs. The first prayer is restricted to the premises at the corner of First street and Eighth avenue, and it substantially leaves to the jury to find the truth of the evidence offered on the part of the plaintiffs, and it maintains that upon the finding of these facts the plaintiffs are entitled to recover. It does not, however, state the measure of damages. With the exception of the description of the property affected, it is a literal copy of the first prayer in *Susquehanna etc. Co. v. Malone*, 73 Md. 268, 25 Am. St. Rep. 595, which this court adjudged to be correct. The second prayer of the plaintiffs maintained in substance that if the nuisance was found by the jury as stated in the first prayer, the recovery would not be defeated even if the defendant used care and skill, and employed the best and most approved appliances in the management of its works. The doc-



trine of this prayer was laid down in Malone's case. At page 276 the court said: "No principle is better settled than that where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to the neighboring owner, for which an action will lie. And this, too, without regard to the locality where such business is carried on; and this, too, although the business may be a lawful business, and one useful to the public, and although the best and most approved appliances and methods may be used in the conduct and management of the business."

The defendant offered three prayers. The court rejected the first prayer, and granted the other two. The rejected prayer is in these words: "The jury are instructed that before the plaintiffs can recover under the pleadings in this case, they must believe that the fumes and gas from the <sup>508</sup> factory of the defendant have occasioned substantial injury to the house owned by the plaintiffs jointly, and in determining this question the jury are instructed that they should take into consideration the locality, and all the surrounding circumstances; and that when expensive works have been constructed, which are needful and useful to the public, if they so find, that persons must not stand on extreme rights and bring actions with respect to every trifling annoyance, but must submit to the reasonable consequences of the carrying on of trades in his immediate neighborhood, which are actually necessary to trade and commerce, and in considering the question of damage to the property of the plaintiffs, the jury are instructed that the plaintiffs cannot recover for any injury they might have prevented by ordinary effort and care." There was evidence that the gases from the defendant's factory not only injured the physical structure of the plaintiffs' house, but made it extremely uncomfortable, disagreeable, and unwholesome as a place of abode, and also seriously injured the business of the store.

This court has several times had occasion to consider the rights of a party under such circumstances. An action for a nuisance rests on the same principles as those which support every other action of tort. If the defendant has committed an injury to the rights or property of the plaintiffs he must respond in damages. In *Dittman v. Repp*, 50 Md. 516, 33 Am. Rep. 325, there was an application for an injunction to restrain the defendants from carrying on a brewery on Bond street in the city of

Baltimore. It was alleged that they were using steam machinery, which produced a loud and deafening noise, which was so disagreeable and offensive to the complainant and his family, who occupied adjoining premises, that with due regard to their health and comfort it would be impossible for them to remain in the house. The court, quoting from Lord Chancellor Westbury, in *Tipping v. St. Helen's Smelting Co.*, 11 H. L. Cas. 650, said: "If a man lives in a town, of necessity he must submit himself to the consequences of <sup>569</sup> the obligations of trades which may be carried on in his immediate neighborhood, which are actually necessary for trade and commerce, also for the enjoyment of property, and for the benefit of the inhabitants of the town. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop." It also said: "But still, as we have said, there is a limit to the discomforts and annoyances to which a party may be required to subject himself without remedy by living in a city or a manufacturing district; and the authorities are numerous which hold that noise alone, if it be of such character as to be productive of actual physical discomfort and annoyance to a person of ordinary sensibility, may create a nuisance, and be the subject of an action at law, or an injunction from a court of equity, though such noise may result from the carrying on of a trade or business in a town or city." *Chappell v. Funk*, 57 Md. 465, was a bill in equity for an injunction to restrain and prohibit the operation of a factory for the manufacture of vitriol, sulphuric acid, and other products. The facts are not stated in the report of the case. But a reference to the record on file in this court will show that Funk owned and possessed a lot of ground in the city of Baltimore on which there were several dwelling-houses, that he occupied one of them as a place of abode, and that the greater portion of the lot was used by him as a garden in which he raised large quantities of produce, such as plants, vines, fruits, and vegetables of excellent quality, and that he had been in the habit of selling them at high prices and had realized great pecuniary profit in this way; and that immediately in the rear of his lot there was the factory in question, which was conducted, controlled and operated by the defendants, and that in the course of the business conducted by them large quantities of smoke, and of noxious, noisome, offensive, and unwholesome <sup>570</sup> vapors and gases were produced and emitted from

the said factory, and that the smoke came over and upon Funk's said garden and dwelling-house, and that offensive smells from the factory pervaded the dwelling-house and garden, and that noxious and unwholesome gases were diffused over and upon the garden and throughout the dwelling-house; and that these causes killed and destroyed his plants, flowers, and vegetables, and prevented Funk from cultivating his garden successfully and profitably, and inflicted great pecuniary loss and injury upon him, and that the noxious vapors and gases corrupted and polluted the air and were greatly deleterious to the health of his family, and greatly incommoded and annoyed them, and took away from them all reasonable comfort in the occupation of their home. This court held that it was very clear that the averments in the bill of complaint were quite sufficient to warrant the granting of relief by injunction. If there could be any doubt of the reason for the decision in this last-mentioned case, and in *Dittman v. Repp*, 50 Md. 516, 33 Am. Rep. 325, it will be entirely cleared up by what was said in *Adams v. Michael*, 38 Md. 123, 17 Am. Rep. 516, referred to in *Dittman's* case, and made the basis of its decision. In *Adams v. Michael*, 38 Md. 123, 17 Am. Rep. 516, the court quotes with approval the words of Lord Romilly, in *Crump v. Lambert*, L. R. 3 Eq. Cas. 409. His lordship says: "The law on this subject is, I apprehend, the same whether it be enforced by action at law or by bill in equity. . . . There is, I apprehend, no distinction between any of the cases, whether it be smoke, smell, noise, vapors or water, or any gas or fluid. The owner of one tenement cannot cause or permit to pass over, or flow into his neighbor's tenement any one or more of these things in such a way as materially to interfere with the ordinary comfort of the occupier of the neighboring tenement, or so as to injure his property." He also says: "The real question in all the cases is the question of fact, viz., whether the annoyance is such as materially to interfere with the ordinary comfort of human existence. This is what is established in *St. Helen's* <sup>571</sup> *Smelting Co. v. Tipping*, 11 H. L. Cas. 642." Let us now refer to the *St. Helen's* case, which has always been considered a high authority by this court. In that case the defendant was sued for damage alleged to have been caused by smelting works used on land near to the dwelling-house and lands of plaintiff. It was in evidence that the whole neighborhood was studded with manufactories and tall chimneys, that there was some alkali works close by the defendant's works, that the smoke from one was quite as injurious as the smoke from the other, that the



smoke of both sometimes united, and that it was impossible to say to which of the two any particular injury was attributable. The fact that the defendant's works existed before the plaintiff bought the property was also relied on. In the house of lords the lord chancellor said that "the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors would not apply to circumstances, the immediate result of which is sensible injury to the value of the property." And speaking of an argument made in behalf of the defendant that the whole neighborhood where the smelting works were carried on was more or less devoted to manufacturing purposes of a similar kind, and that it was consequently a fit place for such a business, he said: "That is not the meaning of the word 'suitable,' or the meaning of the word 'convenient,' which has been used as applicable to the subject. The word 'suitable' unquestionably cannot carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighboring property." Lord Cranworth said: "It is extremely difficult to lay down any actual definition of what constitutes an injury, because it is always a question of compound facts, which must be looked to to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comfort of life and enjoyment of property."

<sup>572</sup> We have considered at a length which is perhaps unnecessary the reasons and authorities, on which the opinion of this court is founded on questions of the character presented in this case. We have done so, because we perceived from the argument that the principle was very important to the appellant in this case. We have not meant, however, to imply any dissatisfaction with the decision in *Susquehanna etc. Co. v. Malone*, 73 Md. 268, 25 Am. St. Rep. 595, in which the same fertilizer company was appellant. That decision was approved in *Euler v. Sullivan*, 75 Md. 616, 32 Am. St. Rep. 420, and we have no doubt of its correctness. In the opinion it was said: "So we take the law to be well settled that, in actions of this kind, the question whether the place where the trade or business is carried on, is a proper and convenient place for the purpose, or whether the use by the defendant of his own land is, under the circumstances, a reasonable use, are questions which ought not to be submitted to the finding of the jury." In the rejected prayer on the part of the defendant it was

proposed to instruct the jury in determining the question of substantial injury to the plaintiff's house, that they should take into consideration the locality and surrounding circumstances, and other matters which appear in the prayer which we have already quoted in full, and which need not be repeated here. The jury are not told what exculpatory inference they would be at liberty to draw from these matters after they had taken them into consideration. But they were to consider them in determining whether the injury was substantial or not. Manifestly none of them could have any tendency to show whether the injury to the house was great or small. One of the plaintiffs testified that the house had entirely "gone to rack"; that the gases had affected the paint on the house, and made the shingles on the roof loose by eating the nails; and that the tin roof on the stable had been eaten up. Both of the plaintiffs testified that the gases from the factory made living in the house extremely uncomfortable and unhealthy. The wife testified that customers had ceased coming to the store on account of the gas and fumes and that they had <sup>573</sup> nearly broken it up. This evidence, if believed by the jury, would justify them in finding substantial injury to the rights of the plaintiff without any regard whatever to the locality. It is not in any manner countervailed or weakened by any of the matters suggested for the consideration of the jury in the rejected prayer. The proper question for the jury was whether the operation of the factory interfered with the reasonable and comfortable enjoyment by the plaintiffs of their property; or occasioned material injury to the property itself. The finding of these facts depended on the evidence applicable to them, and not on locality or any other matter embraced in the rejected prayer.

Judgment affirmed.

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**NUISANCE — LAWFUL BUSINESS — WHEN BECOMES. —** A trade or business, though lawful and useful, is a nuisance if it interferes with the reasonable enjoyment of neighboring property, or injures the property itself: Note to *Kaje v. Chicago etc. Ry. Co.*, 47 Am. St. Rep. 629, 630. A business which is not a nuisance per se may become such by reason of the particular locality in which it is situated, as where a coal shed is located in the heart of a city, in the midst of stores and dwellings, and so operated as to make grating and grinding noises, and to scatter dust and dirt, to the injury and discomfort of the occupants of adjoining property: *Wylle v. Elwood*, 134 Ill. 281; 23 Am. St. Rep. 673, and note; or where a machine and blacksmith shop is located in a district occupied by costly residences: *McMorran v. Filtzgerald*, 106 Mich. 649; 58 Am. St. Rep. 511, and note. See *Rogers v. Philadelphia Traction Co.*, 182 Pa. St. 473; 61 Am. St. Rep. 716, and note. And it is no defense that such a busi-

ness is lawful, and useful to the public, and the best and most approved methods and appliances are used in its conduct and management: *Euler v. Sullivan*, 75 Md. 616; 32 Am. St. Rep. 420, and note. What degree or amount of discomfort is necessary to constitute a nuisance must be determined by the circumstances of each case: *Ross v. Butler*, 19 N. J. Eq. 294; 97 Am. Dec. 654, and note. See extended notes to *Rouse v. Martin*, 51 Am. Rep. 467-475, and *Appeal of Pennsylvania Lead Co.*, 42 Am. Rep. 540-542.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MICHIGAN.**

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**HELLER v. CHICAGO & GRAND TRUNK RAILWAY Co.**

[109 MICHIGAN, 53.]

**A CARRIER OF LIVESTOCK is not liable as a common carrier.**

**CARRIERS.**—A shipper of livestock assumes all the ordinary risks of transportation, including that resulting from its restlessness, viciousness, exhaustion, hunger, and thirst, and also from jars and concussions induced by the stopping and starting of the train, and where responsible for the number placed in a car, he also assumes all risks arising from its overcrowded condition.

**A CARRIER OF LIVESTOCK OWES TO THE SHIPPER** the duty to transport the car and its contents with ordinary prudence, skill, and care, and with reasonable dispatch.

**CARRIERS—LIVESTOCK.**—A shipper of livestock, where it is the custom of shippers to send a caretaker, who fails to comply with this custom, assumes all the risk of injury resulting therefrom. He has no right to assume that the conductor or brakeman of the train will perform the duties of caretakers of his stock, and hence cannot recover for losses suffered through their failure to do so.

**JURY TRIAL—INSTRUCTIONS.**—Where a complaint contains several grounds of negligence, it is the duty of the court to instruct the jury as to those upon which alone a recovery may be based, and to eliminate all others.

**NEGLIGENCE—DAMAGE FROM—ONUS OF PROVING.**—Where a plaintiff relies upon the negligence of the defendant as producing an injury, and it is apparent that if such negligence existed and inflicted injury, injury was also suffered through the negligence of the plaintiff himself, it is incumbent on him to prove what injury or damage, if any, was due to the negligent act of the defendant of which complaint is made.

Action to recover for cattle killed and injured while being transported over the defendant's railway. They were loaded in a car thirty-two feet long and eight feet wide by the plaintiff himself, there being twenty-four head of the average weight of

one thousand and seventy-five pounds. They were not longer en route than usual, and the plaintiff did not send any caretaker to look after them. No negligence in the management of the train was shown. During the transit, the conductor became satisfied that the car was too small for the stock, and procured a larger car in which they were placed, and also caused them to be unloaded, rested, and fed. Some of them, however, died, and others were bruised and otherwise injured. The plaintiff recovered judgment, and the defendant appealed.

L. C. Stanley, E. W. Meddaugh, and Geer & Wilson, of counsel, for the appellant.

Ferdinand Brucker and Chauncey H. Gage, for the appellee.

57 GRANT, J. It is of importance to state what grounds of negligence are set forth in the declaration. They are as follows: 1. Delay in transit; 2. Failure to feed, water, and properly care for them; 3. In keeping them in the car from 7 o'clock on March 14th until 10 o'clock on March 16th, without food, water, care, or opportunity to lie down, and without adequate protection from the cold; 4. Placing them in the car in a cramped and uncomfortable position.

The declaration, in summing up the cause of the injury, states that it was "occasioned by the delay, and by said cold, and want of food, water, care, and room."

Upon these allegations, or some of them, must rest the plaintiff's right of recovery.

We will first note those which must be eliminated: (a) Plaintiff suffered nothing by delay, and did not upon the trial, and does not now, ask recovery upon that basis; (b) The cattle were not kept in the car, as charged, but were removed and fed and watered within the time required by the interstate commerce law of the United States: U. S. Rev. Stats., sec. 4386. They were properly watered and fed. Those in charge of the cattle at Bancroft <sup>58</sup> so testified. There is no evidence to the contrary, and nothing to impeach the witnesses; (c) He cannot recover for want of room. If the car was overloaded, this was his own fault. Plaintiff conceded this, and claimed that the car was not overloaded. The court properly instructed the jury that, if overloading was the cause of the injury, plaintiff could not recover; (d) Defendant was not responsible for any injury from the cold weather, nor was there any evidence that the cattle suffered from the cold.

There is, therefore, left only the question whether the defendant performed its duty in properly caring for the animals, for want of care is the only basis upon which a recovery can be had. It is not alleged or claimed that there was negligence in the management of the train. This brings us to the important questions: What risk did plaintiff assume? And what duty did defendant owe to plaintiff in the care of the property committed to it for transportation? The court instructed the jury that the defendant was not liable as a common carrier. Such has been the rule in this state for the past twenty-five years: *Michigan Southern etc. R. R. Co. v. McDonough*, 21 Mich. 165; 4 Am. Rep. 466. The able opinion in that case was written by the late Mr. Justice Christiancy, and is exhaustive in both its reasoning and the authorities cited. While it is usually sufficient to refer to the authority, yet the reason there given is so cogent and forcible in its application to this case that I am constrained to quote parts of it:

“Animals have wants of their own to be supplied; and this is a mode of conveyance at which, from their nature and habits, most animals instinctively revolt; and cattle especially, crowded in a dense mass, frightened by the noise of the engine, the rattling, jolting, and frequent concussions of the cars, in their frenzy, injure each other by trampling, plunging, goring, or throwing down; and frequently, on long routes, their strength exhausted<sup>59</sup> by hunger and thirst, fatigue, and fright, the weak easily fall and are trampled upon, and, unless helped up, must soon die. Hogs, also, swelter and perish. It is a mode of transportation which, but for its necessity, would be gross cruelty, and indictable as such. The risk may be greatly lessened by care and vigilance, by feeding and watering at proper intervals, by getting up those that are down, and otherwise. But this imposes a degree of care and an amount of labor so different from what is required in reference to other kinds of property that I do not think this kind of property falls within the reasons upon which the common-law liability of common carriers was fixed.”

The court further, in discussing what these carriers would naturally do if they were common carriers, or held themselves out as such, said that:

“They [the carriers] must employ a corps of men skilled in the care and management of stock, a business quite foreign in its character from that of operating a railroad, and they must make many other provisions to guard against injury and risk



which are not required for other property generally transported by railroads.

"Now, we must shut our eyes to what is notorious to all business men, or we must take judicial notice, as I think we are bound to do, that this is not the mode, and such are not the principles, upon which this great and rapidly increasing business, of transporting livestock to an eastern market is generally, if at all, done upon the railroads of this state (if, in fact, in any other of the western states).

"I think we are also bound to know that, if this business were done in this mode and upon these principles, and could be done in no other way, and the railroads were to be held responsible as insurers for all damages not caused by the act of God or the public enemies (which is strictly the common-law liability), or by the viciousness of some particular animal or animals in the mass, which would be a ludicrous distinction applied to a carload of cattle, or for all such as might be prevented by human agency, the railroad companies, to indemnify themselves against such risks and the extraordinary expenses of this mode of doing the business, must, of course, demand a much higher freight; and, if they can be compelled to carry at all in this way, they must provide themselves with all the conveniences I have <sup>60</sup> mentioned, and keep on hand a special corps of experienced stockmen; and, being compelled to keep them, and having gone to the expense of the necessary conveniences, it would then be for their interest to charge the higher freight in all cases, and refuse to carry upon any other terms. And, in this manner, those who would prefer to take the care and risk upon themselves for a lower freight would be deprived of the opportunity.

"The law of common carriers is founded mainly upon considerations of public policy, and these considerations, therefore, should not be overlooked. On the other hand, if the drover, with a sufficient force of his own men, experienced in the proper management of the cattle, goes upon the same train free of charge, in a drover's car, provided for that purpose, and has the entire charge, care, and management of the cattle, and the responsibility for care and injury incident to that mode of transportation, the company only furnishing the proper cars and motive power, and being responsible only for their sufficiency, and the proper mode of making up and running the train, it is manifest there will be much less liability to injury or loss, and that the companies can afford to carry the cattle at greatly reduced rates. This, undoubtedly, is the mode, substantially, in

which this branch of business is carried on generally upon the railroads of this state, and probably other western states, so far as relates to the transportation of cattle to an eastern market—sometimes by special contract, setting forth the terms, as in a bill of lading, receipt, or ticket, and sometimes only by the uniform course of business as adopted by the company, and acted upon by their employers.”

Plaintiff assumed all the ordinary risks of transportation, and all injury which resulted from the cramped and crowded condition of the cattle, from their restiveness, viciousness, exhaustion, hunger and thirst during their transportation, and also from the jars and concussions incident to starting and stopping the train.

The defendant owed the duty to transport the car and its contents with ordinary prudence, skill, and care, and with reasonable dispatch. It was understood, and was a part of the contract, that the car was to be transported within the usual time of from twenty-four to thirty-two hours, and that the defendant was under no obligation to unload,<sup>61</sup> water, and feed the cattle if transported within that time. Upon ascertaining that plaintiff had no one in charge of the cattle, it would undoubtedly have been the duty of the defendant to unload and water and feed them when, from any cause, it was unable to transport and deliver them within the usual time. The defendant, upon ascertaining the condition of the cattle (whether because the conductor found that he could not deliver them within the usual time, or not, is immaterial), unloaded and took care of the cattle in a proper manner. In doing this it performed its entire duty toward the plaintiff.

The court instructed the jury that the custom of the shipper to send a caretaker was universal, that it was established beyond controversy, that it applied to this case, that it became a part of the contract, and that plaintiff was bound by it. The court failed to instruct the jury as to the effect of this custom. The plaintiff assumed all those risks and injuries resulting from his failure to comply with this custom to send a caretaker. One of the principal reasons why some one should be employed to keep constant watch of animals, while in these cars, is that it is dangerous for one to lie down. It is therefore necessary that all be kept standing, and if one gets down, that he should be gotten up as soon as possible. The danger from one lying down is apparent. He is apt to be trampled upon, his flesh bruised and bones broken, and he is also a constant menace to those that are standing. The plaintiff not only did not send such a

caretaker, but he did not request the defendant to assume such care, did not notify it that he was sending no caretaker, nor request its agents in charge of the train to exercise any supervision or care over them. He therefore assumed all the risks from the failure upon his part to comply with the custom. This custom was recognized by this court as early as 1867: *McMillan v. Michigan etc. R. R. Co.*, 16 Mich. 109; 93 Am. Dec. 208. The conductor and brakeman of this train had other constant and important duties to perform in its management. To impose upon them the additional duty of looking after twenty-four cars of livestock, and to see that the animals were kept in proper condition and position, would be unreasonable, and not a duty assumed by this defendant. The rates of transportation are fixed with a view to the universal custom that the shipper must perform this duty, if he desires it to be performed, or make a special contract with the carrier to do so: *Kimball v. Rutland etc. R. R. Co.*, 26 Vt. 258; 62 Am. Dec. 567. Now, it is evident that such a caretaker could have watched these cattle, and prevented this injury, whether they were overloaded or not. For this neglect the plaintiff alone is responsible, and it bars his recovery. In *German v. Chicago etc. R. R. Co.*, 38 Iowa, 127, the defendant was held liable because it shipped some of the plaintiff's cars without notice to him, and thus prevented him from accompanying them as he intended. The defendant was properly held liable for not taking the care which the owner would have taken, had he not been prevented from accompanying the train.

It is insisted by the defendant that this car was overloaded, that this caused the injury, and that such overloading was negligence per se. As already shown, the plaintiff alone was responsible for the manner of loading. Nine witnesses, experienced in the transportation of cattle, testified that the car was overloaded. The plaintiff, his agent who shipped them, and two other witnesses gave their opinions that the car was not overloaded. The plaintiff admitted that it would have been impossible to get another animal into the car. One of plaintiff's witnesses had had experience from 1871 to 1876, in the summer time, in shipping and driving cattle in the Indian territory. His impression was that the cars which were then used were thirty-three feet long, but he said he might be mistaken. He would not say that even twenty-seven cattle were too many to put in such a car. He also testified that it would be dangerous to ship cattle without some one in charge of them. The conductor,



<sup>63</sup> upon investigation, determined that the car was too small, and put his company to the expense of sending a larger one with which to complete the journey. Aside from the opinions of the witnesses, the fact is that, when these cattle were placed in the customary manner, crosswise of the car, each one had only sixteen and one-half inches in which to stand, and that, whether standing crosswise or in any other manner, each animal had but eleven square feet of room. It requires the opinion of no witness to inform us that each animal was more than sixteen and one-half inches in thickness, and that they could not stand in this crowded condition without their ribs being compressed within a space less than their natural limits. Animals so situated are completely helpless, and the weaker ones must soon become exhausted, and fall down. One had died and the two others which were down lay apparently lifeless before they had been in transit twenty-four hours. Speaking for myself, I do not hesitate to say that such loading was negligence per se, and, under the laws of this state, would be indictable as cruelty to animals. Inasmuch, however, as the determination of this question is not essential, and some of my brethren are of the opinion that there was a conflict of evidence, which was proper for the determination of the jury, we do not pass upon it. Under the case made by the evidence, the court should, as requested, have directed a verdict for the defendant.

It is contended that it was negligence for the defendant to place the body of the dead steer in the car at Bancroft, and that injury resulted from this act. It is evident that most of the injury was done before the original car reached Bancroft, and, as already stated, the plaintiff was responsible for this. It is impossible to determine what, if any, injury was caused after the car left Bancroft. If this act was negligence it was clearly the duty of the plaintiff to show what injury, if any, resulted therefrom. He could not, in any event, recover for an injury, part of which was caused by his own neglect, without showing <sup>64</sup> that which resulted from defendant's subsequent negligence. No such act of negligence is alleged, and quære whether he can recover without alleging it. Plaintiff knew the position of this dead animal in the car when delivered, and, knowing it, there is much force in the position that he should have alleged it.

In the event of a new trial, it is proper to note some other errors that were committed, upon the basis that a case may be made which should be left to the jury. The court failed to instruct the jury, as it should have done, what acts charged in the dec-

laration should be eliminated from their consideration. The court left it to the jury upon the general statement that the defendant was liable "if it did not give that care to the cattle which it should have given, and did not handle them with that degree of care to convey them safely and without injury." Where a declaration contains several grounds of negligence, it is the duty of the court to instruct the jury as to those upon which, alone, recovery can be based, and to eliminate the others. The court should, as requested, have instructed the jury that the defendant did not undertake to render the additional service of watching and starting the cattle up, so as to prevent any sinking down and getting under the feet of the others, or prevent their unduly crowding and injuring one another; that plaintiff assumed any damage or loss that might be occasioned by want of an attendant, and also all that resulted from the nature, restiveness, and viciousness of the animals.

The judgment must be reversed and a new trial ordered.

Long, C. J., Hooker and Moore, JJ., concurred with Grant, J.

Montgomery, J., concurred in the result.

**NEGLIGENCE—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.**—Contributory negligence will not defeat a recovery where such negligence preceded the injury, and was known to the defendant, who, by the exercise of ordinary and reasonable care, could have avoided the injury: *Keefe v. Chicago etc. Ry. Co.*, 92 Iowa, 182; 54 Am. St. Rep. 542. The burden of proving negligence rests upon him who alleges it: *Murray v. Missouri etc. Ry. Co.*, 101 Mo. 236; 20 Am. St. Rep. 601; *Cosulich v. Standard Oil Co.*, 122 N. Y. 118; 19 Am. St. Rep. 475, and note; *Gibson v. City of Huntington*, 38 W. Va. 177; 45 Am. St. Rep. 853, and note.

**NEGLIGENCE—INSTRUCTIONS CONCERNING.**—It is sufficient for the court to state, in its charge to the jury, the law of negligence as applied to the facts of the case: *Taylor etc. Ry. Co. v. Taylor*, 79 Tex. 104; 23 Am. St. Rep. 316. See *Louisville etc. Ry. Co. v. Brantley*, 96 Ky. 297; 49 Am. St. Rep. 291.

#### **Respective Duties of Carriers and Shippers of Livestock.\***

*Carriers of Livestock Are Common Carriers.*—The liability of carriers of live animals is thoroughly discussed in an elaborate note to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec 208-217, from which it clearly appears that the duties and liabilities imposed on common carriers, in such cases, are generally treated as inseverable; but the plain reason for this is that a failure of duty resulting in loss to the shipper fixes liability. As usually treated, the respective duties of carriers and shippers of livestock are to be inferred from statements

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\* REFERENCE TO MONOGRAPHIC NOTES.

Liability of carriers of live animals: 67 Am. Dec. 208-217.

made as to what are their respective liabilities. The object of this note is to state those duties directly, without discussing at length the liability which follows a failure to perform them.

The doctrine that carriers of animals are liable as common carriers, in the absence of an express contract limiting liability, has been distinctly and unequivocally rejected in the state of Michigan. In that state a railroad company is not a common carrier of livestock unless it has held itself out as such. There is, consequently, no duty there to accept livestock for transportation, and no liability for refusing to do so: See note to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 208, 209; *Lake Shore etc. R. R. Co. v. Perkins*, 25 Mich. 329; 12 Am. Rep. 275; *Michigan etc. R. R. Co. v. McDonough*, 21 Mich. 165; 4 Am. Rep. 466; *Great Western etc. Ry. Co. v. Hawkins*, 18 Mich. 427. It has also been held in Tennessee that railroad companies are not bound as common carriers of livestock: *Baker v. Louisville etc. R. R. Co.*, 10 Lea, 304. But in other states the general rule is, that the carriers undertaking the transportation of animals are common carriers, subject to the same responsibilities imposed by law on carriers of other property, except as this may be modified by special contract, or by the inherent character of such property. In other words, there is a common-law duty to deliver the animals safely, but no liability for loss or injury resulting from their nature or propensities. If the loss or injury, for which a recovery of damages is sought, was not connected with the conduct, character, or propensities of the animals undertaken to be carried, the ordinary responsibility of the carrier should attach: Note to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 208; *South etc. R. R. Co. v. Henlein*, 52 Ala. 606; 23 Am. Rep. 578; *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 134; *McCune v. Burlington etc. R. R. Co.*, 52 Iowa, 600; *Kinnick v. Chicago etc. Ry. Co.*, 69 Iowa, 665; *Missouri Pac. Ry. Co. v. Harris*, 67 Tex. 166; *Bamberg v. South Carolina R. R. Co.*, 9 S. C. 61; 30 Am. Rep. 13; *Kimball v. Rutland etc. R. R. Co.*, 26 Vt. 247; 62 Am. Dec. 567; *Fordyce v. McFlynn*, 56 Ark. 424; *St. Louis etc. Ry. v. Lesser*, 46 Ark. 236; *Myrick v. Michigan Cent. R. R. Co.*, 107 U. S. 102; *Atchison etc. R. R. Co. v. Washburn*, 5 Neb. 117; *Maslin v. Baltimore etc. R. R. Co.*, 14 W. Va. 180; 35 Am. Rep. 748; note to *Nashville etc. Ry. Co. v. Heggie*, 22 Am. St. Rep. 456. In Wisconsin, the rule is stated thus: A railroad company engaged in transporting livestock over its road, and accustomed to furnish suitable cars therefor, upon reasonable notice, whenever within its power to do so, and holding itself out to the public as such carrier for hire upon the terms and conditions prescribed in the written contracts with shippers, is a common carrier of livestock, with such restrictions and limitations of its common-law liability as arise from the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals under such contracts of carriage: *Ayres v. Chicago etc. Ry. Co.*, 71 Wis. 372; 5 Am. St. Rep. 226. The fact that a railroad company undertakes to carry livestock for hire establishes its relation as a common carrier, with the duties and obligations which grow out of it: *Atchison etc. R. R. Co. v. Washburn*, 5 Neb. 117.

*Duty to Receive and Carry.*—With the foregoing recognized



limitations upon the duty and responsibility of carriers of live-stock; the rule is that they must receive and transport live animals as other property: *Gulf etc. Ry. Co. v. Trawick*, 68 Tex. 314; 2 Am. St. Rep. 494; *Ballentine v. North Missouri R. R. Co.*, 40 Mo. 491; 93 Am. Dec. 315; and, after a carrier has received livestock for transportation, it becomes an insurer of the animals, as in case of other property which it is bound to transport, against loss from any cause except the act of God, the public enemy, the act of the owner, or the vicious propensities or inherent character of the animals themselves: *Gulf etc. Ry. Co. v. Trawick*, 68 Tex. 314; 2 Am. St. Rep. 494; *Agnew v. Steamer Contra Costa*, 27 Cal. 425; 87 Am. Dec. 87; *Texas Pac. Ry. Co. v. Nicholson*, 61 Tex. 491, 495; *Nashville etc. R. R. Co. v. Jackson*, 6 Heisk. 271, 273; *Black v. Chicago etc. R. R. Co.*, 30 Neb. 197; *St. Louis etc. Ry. v. Lesser*, 46 Ark. 236; *Maslin v. Baltimore etc. R. R. Co.*, 14 W. Va. 180; 35 Am. Rep. 748; though it has been said that the carrier is not an insurer, in the broad sense of that term: *East Tennessee etc. R. R. Co. v. Johnston*, 75 Ala. 596; 51 Am. Rep. 489; *Louisville etc. R. R. Co. v. Hedger*, 9 Bush, 645; 15 Am. Rep. 740. The modification of the carrier's common-law duty, that he is not an insurer, is probably understood to mean no more than that the carrier is not answerable for injuries resulting without his fault from the inherent nature and propensities of the animals themselves. Notwithstanding the different phraseology used in discussing the question as to whether a carrier of livestock is an insurer or not, we do not understand that there is any real conflict of authority upon the matter: See *Lindsley v. Chicago etc. Ry. Co.*, 36 Minn. 539; 1 Am. St. Rep. 692; *Louisville etc. Ry. Co. v. Bigger*, 66 Miss. 319.

It is the duty of a railroad company receiving livestock for carriage to transport the animals within a reasonable time after receiving them: *Pennsylvania Co. v. Clark*, 2 Ind. App. 146; *Illinois Cent. R. R. Co. v. Simmons*, 49 Ill. App. 443; note to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 213; though it cannot be said, as a matter of law, that this means that the shipment must be made on the first train which leaves after the property has been delivered for transportation: *Pennsylvania Co. v. Clark*, 2 Ind. App. 146. The company is bound to receive and transport cattle when they are first offered for shipment, unless it has a reasonable excuse for its refusal; but a plea that a statute prohibits the carrying of certain cattle into or through the state, is no excuse for a refusal or delay in receiving and shipping such cattle when offered, where the statute is unconstitutional: *Chicago etc. R. R. Co. v. Erickson*, 91 Ill. 618; 33 Am. Rep. 70. After one herd of cattle has been offered for shipment and accepted, though its inspection, under the inspection laws, is not quite complete, it is the contract duty of the carrier to transport the herd, and this duty is violated by the acceptance of a second herd for shipment, the inspection of which has been completed, where the inspection of the first herd could have proceeded to completion so as to cause no delay in the shipment: *Receivers v. Wright*, 2 Tex. Civ. App. 198. A pressure of business may, under some circumstances, justify a carrier's refusal to receive

freight, but after the carrier has received animals for shipment, it cannot excuse delay in their transportation upon the ground that there was an unusual rush of business on its road: *International etc. Ry. Co. v. Anderson*, 3 Tex. Civ. App. 8. If there is no contract fixing a time for shipment, the animals must be shipped within a reasonable time, which must depend upon the circumstances of the particular case: *Cincinnati etc. Ry. Co. v. Case*, 122 Ind. 310. If cattle are placed in cars provided for them by the carrier for their transportation, with his full knowledge, in time for the next regular cattle train, he is bound to carry them by that train, and is liable for injury resulting through delay in not so shipping them: *Illinois etc. R. R. Co. v. Waters*, 41 Ill. 73.

It is also the duty of a carrier of livestock to carry the animals upon reasonable terms, and for all, if the carrier is provided with the facilities for doing so: *Note to Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 213. The liability of a railway company as a common carrier attaches when the animals are delivered to, and accepted by, it for transportation: *International etc. Ry. Co. v. Dimmit Pasture Co.*, 5 Tex. Civ. App. 186. Its liability for the safety of the animals begins when they are received for shipment into its stockpens prepared by it in aid of the shipment: *Gulf etc. Ry. Co. v. Trawick*, 80 Tex. 270. Under the statute of Texas, the trip or voyage is considered as having commenced from the time of the signing of the bill of lading, and the carrier's liability attaches, as at common law, from and after such signing; but this does not change the common-law rule that the liability of the carrier attaches when the property is delivered to, and accepted by, it for transportation: *International etc. Ry. Co. v. Dimmit etc. Pasture Co.*, 5 Tex. Civ. App. 186; *Texas etc. Ry. Co. v. Nicholson*, 61 Tex. 491, 495.

*Duty to Furnish Facilities for Transportation.*—It is the duty of those who transport livestock to provide every suitable facility therefor: *Note to Kansas Pac. etc. Ry. Co. v. Nichols*, 12 Am. Rep. 501. "When animals," says Mr. Justice Harlan, in *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 134, "are offered to a carrier of livestock to be transported, it is its duty to receive them; and that duty cannot be efficiently discharged, at least in a town or city, without the aid of yards in which the stock offered for shipment can be received and handled with safety and without inconvenience to the public while being loaded upon the cars in which they are to be transported. So, when livestock reach the place to which they are consigned, it is the duty of the carrier to deliver them to the consignee; and such delivery cannot be safely or effectively made except in or through inclosed yards or lots, convenient to the place of unloading. In other words, the duty to receive, transport, and deliver livestock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee." The measure of obligation and sufficiency of accommodation of a common carrier to furnish trans-



portation must be determined by the amount of freight ordinarily carried on any given line of road. This duty of the carrier is not peculiar to any season of the year, or any special emergency which may arise in the course of business; thus, if by reason of a sudden or unusual demand for stock or produce in the market, or from any other cause, there should be a sudden and unexpected influx of business, the obligation to carry will be fully met by shipping the freight in the order and priority of time in which it is offered. The carrier's means of transportation must be so distributed at the various stations along the road as to afford a reasonable amount of accommodation for all. One station must not be furnished with means of transportation to the prejudice of another. The carrier must receive all freight that may be offered, and within a reasonable time, and in the order in which it is offered, transport it to the point designated by the owner or party in charge. This duty must be performed in good faith, without favor or partiality to any one: *Ballentine v. North Missouri R. R. Co.*, 40 Mo. 491; 93 Am. Dec. 315. In the carriage of livestock, a railroad company is not required to use the safest and best motive power, with the best appliances in use. It is required to use only such cars and motive power and appliances as are suitable, safe, and sufficient: *Illinois Cent. R. R. Co. v. Haynes*, 63 Miss. 485, 488.

*Duty to Furnish Stockpens and Yards.*—If a railroad company holds itself out as a carrier of livestock, the law imposes upon it the duty of providing suitable and safe facilities, such as yards or pens, both at the place of shipment and the place of destination, for receiving and discharging the livestock offered it for shipment over its road: *Norfolk etc. R. R. Co. v. Harman*, 91 Va. 601; 50 Am. St. Rep. 855; *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128; *Chapin v. Chicago etc. Ry. Co.*, 79 Iowa, 582; *Armstrong v. Chicago etc. Ry. Co.*, 45 Minn. 85. It is the duty of the carrier to provide pens suitable in any kind of weather, and he is answerable for suffering and injury caused by muddy pens, or those which expose animals to the cold: *International etc. Ry. Co. v. McRae*, 82 Tex. 614; 27 Am. St. Rep. 926; *Feinberg v. Delaware etc. R. R. Co.*, 52 N. J. L. 451. It is also the carrier's duty to keep pigpens free of lime, which may injure swine: *Shaw v. Great Southern etc. Ry. Co.*, 8 Irish Law Rep. 10; and to keep a pen in which sheep are confined free of salt water, because, if it is accessible to them, and they drink of it, they will probably sicken and die: *Norfolk etc. R. R. Co. v. Harman*, 91 Va. 601; 50 Am. St. Rep. 855. In Texas, the statutory duty imposed upon railway companies to erect, at each station, suitable buildings or inclosures to protect freight, includes stockpens for the protection of cattle offered for shipment, and they must be sufficiently safe for the purpose indicated: *Gulf etc. Ry. Co. v. Trawick*, 80 Tex. 270. A carrier cannot make any extra charge for stockpens, in addition to the customary and legitimate charges for transportation, for merely receiving or merely delivering stock in and through yards provided for that purpose; neither can it allow any agent it employs to make such a special charge: *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128. But, a carrier, accustomed



to deliver cars of cattle off its line, by transporting them over a line belonging to the stockyards company, for which it pays a fixed sum per car, is under no duty to consignees, whose business is located at the stockyards, to furnish unloading facilities at its own station, in a different part of the city. The carrier may make a freight charge to the city, and a separate terminal charge, of a fixed sum per car, for delivery at the stockyards: *Walker v. Keenan*, 73 Fed. Rep. 755.

*Duty to Furnish Safe and Suitable Cars.*—A railroad company undertaking to transport livestock is bound to furnish strong, safe, and suitable cars, and is answerable for any loss arising from a neglect of duty in this particular: *Peters v. New Orleans etc. R. R. Co.*, 16 La. Ann. 222; 79 Am. Dec. 578; *Mason v. Missouri Pac. Ry. Co.*, 25 Mo. App. 473; note to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 211, 215; *Betts v. Chicago etc. Ry. Co.*, 92 Iowa, 343; 54 Am. St. Rep. 558; *Union Pac. Ry. Co. v. Rainey*, 19 Colo. 225; *Terre Haute etc. R. R. Co. v. Crews*, 53 Ill. App. 50; *St. Louis etc. Ry. Co. v. Dorman*, 72 Ill. 504. A common carrier of livestock for hire, holding itself out to the public as such, under the restrictions and limitations named in its contracts with shippers, is bound to furnish suitable cars for such stock, upon reasonable notice, whenever it can do so with reasonable diligence, without jeopardizing its other business as such common carrier: *Ayres v. Chicago etc. Ry. Co.*, 71 Wis. 372; 5 Am. St. Rep. 226.

A carrier is bound to provide a reasonably safe car for the transportation of stock, having in view such conduct as is usual or ordinary for it, even though such conduct may be the result of its natural propensities, but, if such a car is provided, and the stock is injured simply because of its propensity to kick, the carrier is not liable. A reasonably safe car is not one that will merely hold or confine the stock for transportation, but it must be a car reasonably safe for transporting the stock without injury from any cause that should be reasonably anticipated. Though the car is sufficient to confine the stock, yet it must be strong enough to resist the ordinary acts and usual conduct of such stock when carried on cars, such, for instance, as kicking, and if, through the weakness of the car and such acts, injury to the stock results, the carrier is answerable: *Betts v. Chicago etc. Ry. Co.*, 92 Iowa, 343; 54 Am. St. Rep. 558. A carrier of livestock is not required to have vehicles strong enough to withstand the struggles of unruly and vicious stock. It is sufficient for the carrier to furnish cars suitable for the safe conveyance of ordinary animals of the class contracted to be conveyed: *Selby v. Wilmington etc. Ry. Co.*, 113 N. C. 588; 37 Am. St. Rep. 635. A stricter rule, however, is announced in other cases, which makes it the carrier's duty to furnish cars strong enough to resist the struggles of unruly and vicious animals: *Smith v. New Haven etc. R. R. Co.*, 12 Allen, 531; 90 Am. Dec. 166; *Rhodes v. Louisville etc. R. R. Co.*, 9 Bush, 688.

It is the carrier's duty to see that the car doors are safe: *Root v. New York etc. R. R. Co.*, 83 Hun, 111; and the carrier must, in Missouri, furnish cars provided with trap doors as required by

statute: *Paddock v. Missouri Pac. Ry. Co.*, 60 Mo. App. 328. In that state, the carrier must also furnish double-decked cars for carrying sheep when requested: *Emerson v. St. Louis etc. Ry. Co.*, 111 Mo. 161. If a railway company has expressly agreed to furnish cars to a shipper for transporting his stock, it is under an obligation to fulfill its contract notwithstanding such a pressure of business upon the road as to render it impossible for the company to furnish the cars: *Gulf etc. Ry. Co. v. Hume*, 87 Tex. 211. A railroad company, however, is not generally held to more than reasonable diligence and care in furnishing cars for the transportation of livestock. Hence, if the free movement of cars is temporarily prevented by the wreck of a train, that is a legal excuse for delay in having cars at a particular place at a certain time according to a special agreement: *Newport etc. Co. v. Mercer*, 96 Ky. 475. A common carrier owes the same duty, relatively, to all shippers at stations of the same business importance, as to supplying cars, and no station, much less any one shipper, has the right to command the entire resources of the carrier to the exclusion of other stations and shippers, but the cars must be so distributed at the different stations as may be in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity: *Ayres v. Chicago etc. Ry. Co.*, 71 Wis. 372; 5 Am. St. Rep. 226. If a shipper applies to a carrier of livestock for cars to be furnished at a time and station named, the carrier must inform the shipper within a reasonable time, if practicable, whether it is unable to so furnish, and if it fails to give such notice, and has induced the shipper to believe that the cars will be in readiness at the time and place named, and the shipper, relying thereon, is present with his livestock at such time and place, and finds no cars, the carrier is liable in damages: *Ayres v. Chicago etc. Ry. Co.*, 71 Wis. 372; 5 Am. St. Rep. 226.

*Duty to Feed and Water Stock.*—It is the duty of a carrier of animals to feed and water them: *Missouri Pac. R. R. Co. v. Fagan*, 72 Tex. 127; 13 Am. St. Rep. 776; *Dunn v. Hannibal etc. R. R. Co.*, 68 Mo. 268; *Toledo etc. Ry. Co. v. Hamilton*, 76 Ill. 393; *International etc. Ry. Co. v. McRae*, 82 Tex. 614; 27 Am. St. Rep. 926; *Nashville etc. Ry. Co. v. Heggie*, 86 Ga. 210; 22 Am. St. Rep. 453; *Illinois Cent. R. R. Co. v. Adams*, 42 Ill. 474; 92 Am. Dec. 85; *Brockway v. American Exp. Co.*, 168 Mass. 257, 259; *Hale v. Missouri Pac. Ry. Co.*, 36 Neb. 266; *Missouri Pac. Ry. Co. v. Ivy*, 79 Tex. 444; and this duty cannot be transferred to the shipper by proof of a custom requiring the owner to go on the same train with his stock, to feed and water it: *Missouri Pac. R. R. Co. v. Fagan*, 72 Tex. 127; 13 Am. St. Rep. 776; but a special contract, by which the shipper assumes the duty of feeding and watering the stock relieves the carrier from such duty; and the shipper is bound to such duty when reasonable facilities therefor are furnished by the carrier: *Fort Worth etc. Ry. Co. v. Daggett*, 87 Tex. 322; *Holloway v. Wabash Ry. Co.*, 62 Mo. App. 53, 54. If the agent of a shipper abandons the charge of livestock in his custody, under a special contract between the carrier and

owner, this does not impose upon the carrier the burden of caring for the stock, but is an act of negligence on the part of the owner: *Fort Worth etc. Ry. Co. v. Daggett*, 87 Tex. 322.

If the shipper has assumed, by special contract, to feed and water his stock, the carrier must afford him reasonable facilities for doing so: *Smith v. Michigan Cent. R. R. Co.*, 100 Mich. 148; 43 Am. St. Rep. 440; *Duvenick v. Missouri Pac. Ry. Co.*, 57 Mo. App. 550; *Brockway v. American Exp. Co.*, 168 Mass. 257, 259; *Chesapeake etc. Ry. Co. v. American Exchange Bank*, 92 Va. 495; *Lowenstein v. Wabash R. R. Co.*, 63 Mo. App. 68; *Comer v. Stewart*, 97 Ga. 403; *Bryant v. Southwestern R. R. Co.*, 68 Ga. 805. The shipper has no right to designate the time and place that the train should be stopped to allow him to feed and water, but he undoubtedly has a right to insist that his stock shall be fed and watered at a place agreed upon, and where it is customary, in shipments of the kind, to feed and water the stock: *Lowenstein v. Wabash R. R. Co.*, 63 Mo. App. 68. The carrier must not carry the stock past its place of destination, and there detain it for several days, without attention, food, or water: *Bryant v. Southwestern R. R. Co.*, 68 Ga. 805. The fact that the carrier's stockyard at its feeding station is on fire upon the arrival of the train, does not excuse it for not furnishing the person in charge of the stock all proper facilities for caring for them, in compliance with the contract of shipment: *Nashville etc. Ry. Co. v. Heggie*, 86 Ga. 210; 22 Am. St. Rep. 453.

A railroad company accepting livestock for transportation under a contract providing that it "is to be loaded, unloaded, fed, watered, and otherwise cared for, while in the cars, by the shipper or owner," thereby becomes a bailee for hire, having control of the cars in which the stock is shipped, is bound to furnish the shipper an opportunity to give the animals the care they may require in case the train is delayed. Such a provision in a contract for the carriage of livestock does not mean that the duty is to be performed by the shipper while the train is in motion and without being afforded an opportunity by the carrier to perform the duty. On the contrary, the carrier must afford the shipper such opportunity if the train is delayed: *Smith v. Michigan Cent. R. R. Co.*, 100 Mich. 148; 43 Am. St. Rep. 440. If a carrier, under a special contract, is required to stop at a particular place, for the purpose of allowing the owner to feed and water his stock, it has been held that the carrier is not answerable for injury occasioned by not stopping at the place designated, unless there was a request to stop before the place named was reached: *Missouri Pac. Ry. Co. v. Texas etc. Ry. Co.*, 41 Fed. Rep. 913.

It is as much the duty of a carrier to provide water, at suitable points on the line of its road, for the use of livestock, as it is its duty to carry such stock: *Toledo etc. Ry. Co. v. Hamilton*, 76 Ill. 393; especially is this true when animals, such as hogs, become heated and in danger of dying from lack of water. If water is scarce on the line of a railroad, so that it cannot be used on hogs being carried by the railroad company, it is the company's duty



to inform shippers of that fact before they ship. If the hogs are doing well, and are not suffering for want of water at a given point or station on the route, the shipper is not negligent in failing to water them at that point, if he does not know that water cannot be had at the next station. If it is a fact that water is scarce at the next station, it is the company's duty to inform the shipper of the fact. It is, in fact, gross negligence not to give such information: *Toledo etc. Ry. Co. v. Thompson*, 71 Ill. 434. It is also the duty of the company, during a scarcity of water, not to allow its pump at a station to be out of order, so that water cannot be provided for live hogs on its train: *Toledo etc. Ry. Co. v. Thompson*, 71 Ill. 434. If a shipper agrees that cattle shall not be watered and fed at a station named, he might be estopped from claiming negligence on the part of the carrier for not feeding and watering them, if the only delay was such as resulted in the extra time required to make the next feeding station, but this principle would have no application to an unusual delay caused by the carrier's negligence in not making the customary time: *St. Louis etc. Ry. Co. v. Turner*, 1 Tex. Civ. App. 625, 632. A railway company carrying livestock must provide suitable places where they can be fed and watered in every kind of weather, without injury, so far as this can be done by the use of proper care. For a failure to perform this duty, it must respond in damages; nor will its liability be excused by the muddy condition of its feeding places, caused by recent rains: *International etc. Ry. Co. v. McRae*, 82 Tex. 614; 27 Am. St. Rep. 926. A railway company is under no obligation to feed animals shipped over its road, after the line of railway goes into the hands of a receiver: *Texas etc. Ry. Co. v. Barnhart*, 5 Tex. Civ. App. 601. To refuse to apply water to hogs that are being transported in the cars of a railroad company, where the hogs are suffering for water, where a request for such application of the water has been made by the owner, and where water for that purpose is convenient and abundant, is not only a failure of duty, but an act of gross negligence, against which the company has no power to stipulate: *Illinois Cent. R. R. Co. v. Adams*, 42 Ill. 474; 92 Am. Dec. 85.

In addition to the duty imposed upon a common carrier of livestock by the common law, section 4386 of the Revised Statutes of the United States provides that "no railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one state to another, shall confine the same in cars, boats, or vessels of any description for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which the animals have been confined without such rest on con-

necting roads from which they are received shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated." The following section provides that animals so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad company or owners or masters of boats or vessels transporting the same at the expense of the owner or person in custody thereof: U. S. Rev. Stats. sec. 4387. And a penalty is provided for a failure to comply with these two sections: U. S. Rev. Stats., sec. 4388.

These statutory provisions constitute "a humane, rather than a sanitary, regulation," intended to prevent cruelty and injury to animals shipped long distances, and embrace horses, mules, and all animals which may suffer for want of food, water, or rest during such transportation: *Chesapeake etc. Ry. Co. v. American Exchange Bank*, 92 Va. 495, 502. Such unloading is excused by unavoidable causes only. Hence, it is not excused by an accident to a train due to negligence: *Newport etc. Co. v. United States*, 61 Fed. Rep. 488. Under section 4387 of the United States Revised Statutes, the duty to feed and water stock is imposed upon the shipper where the carrier has afforded reasonable facilities therefor: *Fort Worth etc. Ry. Co. v. Daggett*, 87 Tex. 322; and, if the carrier holds horses in a delayed car forty-nine hours without food, drink, or rest, after being requested by the custodian to unload them for the purpose of being fed and watered, an action will lie: *Brockway v. American Exp. Co.*, 168 Mass. 257. The object of section 4386 of the United States Revised Statutes being to prohibit the confinement of animals longer than the time, that section is not a grant of privilege to the carrier authorizing it to confine the stock for the period of time therein mentioned, irrespective of the question of negligence in so doing. The question of negligence, as to such confinement, is still left as at common law, notwithstanding the statute: *Missouri Pac. Ry. Co. v. Ivy*, 79 Tex. 444; and, in addition to the penalty imposed by the statute, a railway company failing to comply with the above requirements would be answerable in damages to the owner of the stock: *Hale v. Missouri Pac. Ry. Co.*, 36 Neb. 266; *Nashville etc. Ry. Co. v. Heggie*, 86 Ga. 210; 22 Am. St. Rep. 453. The above statutory provisions were "intended to prevent cruelty in interstate commerce, as well as danger to the public health, from inducing diseases in animals which are to be used for food": *Brockway v. American Exp. Co.*, 168 Mass. 257, 259.

In an action against a railroad company for negligence and non-compliance with sections 4386 and 4387 of the United States Revised Statutes, by keeping livestock confined in the cars for more than twenty-eight consecutive hours, the fact that the company's stockyard at its feeding station was on fire upon the arrival of the train will not excuse it for not furnishing the person in charge of the stock all proper facilities for caring for them, in compliance



with the contract of shipment, nor for failing to stop the train at some other station, so that the stock, after they had been on the cars more than twenty-eight consecutive hours, might be unloaded, watered, and fed by the person in charge, notwithstanding his want of diligence in not urging that the train be so stopped for that purpose: *Nashville etc. Ry. Co. v. Heggie*, 86 Ga. 210; 22 Am. St. Rep. 453. Section 4386 of the United States Revised Statutes above noticed extends only to shipments of livestock from one state to another: *United States v. East Tennessee etc. R. R. Co.*, 13 Fed. Rep. 642; and in *Illinois Cent. R. R. Co. v. Peterson*, 68 Miss. 454, it is held that the state courts are in no way concerned with the enforcement of this statute.

*Duty as to Loading and Unloading, Bedding, Ventilation of Cars, etc.* Under the inspection laws of Texas, it is not necessary that a shipper's entire herd of cattle shall be inspected before those actually inspected for shipment may be put on railroad cars for shipment. The loading and inspection may be carried on at the same time, when enough cattle of a herd have been inspected to commence loading, and where the remainder of the cattle can be inspected without causing any delay in loading them into the cars for shipment; and the agent of the railway company would not fail in doing his duty by so receiving the cattle: *Receivers v. Wright*, 2 Tex. Civ. App. 198. A carrier must not furnish a car, infected with cattle fever, in which to transport stock; and if it does it cannot escape liability on the ground that the bill of lading was not signed by its agent: *Railway Co. v. Henderson*, 57 Ark. 402, 417.

It is the duty of a carrier receiving livestock for transportation to have proper machinery and facilities for loading the animals, and also for unloading them whenever, in the course of the transit, it may become necessary to unload them for the purpose of feeding: *Dunn v. Hannibal etc. R. R. Co.*, 68 Mo. 268; *Norfolk etc. R. R. Co. v. Harman*, 91 Va. 601; 50 Am. St. Rep. 855; and the carrier is liable as a common carrier, although the shipper agrees to furnish the cars and to load and unload them entirely: *Fordyce v. McFlynn*, 56 Ark. 424. Although a shipper has agreed to load, feed, water, and unload his stock at his own risk and expense, yet it is the duty of the carrier to furnish suitable and safe facilities for loading and unloading the stock, while being carried over its line: *Chesapeake etc. Ry. Co. v. American Exchange Bank*, 92 Va. 495. If the shipper has agreed to load, transfer, and unload cattle at his own cost, and the carrier makes a mistake, at a regular feeding place for stock in transitu, whereby some of the cattle are sent to the wrong point, and other cattle are mixed with those of the shipper, the carrier is answerable, although it has provided the necessary arrangements for unloading, feeding and reloading stock, because it is the duty of the carrier to prevent stock from becoming intermingled: *Norfolk etc. R. R. Co. v. Sutherland*, 89 Va. 703; but, if a shipper has agreed to load and unload stock, and the carrier relies upon such undertaking, it is not answerable for negligent loading by the shipper, notwithstanding the carrier's general duty to see that the ani-



imals are properly loaded: *Fordyce v. McFlynn*, 56 Ark. 424. It has been held, however, that a carrier must not cause horses or cattle to be loaded in a car an unreasonable time before the departure of a train, although it is exempted from liability for injury caused by mere delay: *Alabama etc. Ry. Co. v. Sparks*, 71 Miss. 757; *Kansas etc. Ry. Co. v. Ayers*, 63 Ark. 331. A special contract under which a shipper agrees to care for his stock, and to load and unload them at his own risk, does not authorize him to determine where and under what circumstances the loading and unloading shall take place, but rather imposes on him the duty of loading and unloading wherever and whenever the exigencies of the transportation may, in the judgment of the carrier, render it necessary: *McAllister v. Chicago etc. R. R. Co.*, 74 Mo. 351. It is the duty of a railroad company to unload horses at the time agreed upon, and it is liable for an injury to the animals through delay in unloading them: *Corbett v. Chicago etc. Ry. Co.*, 86 Wis. 82; *Benson v. Gray*, 154 Mass. 391, 394. If a train, which is to take cattle, passes the station at which they are waiting, between 10 and 11 o'clock at night, without taking them, it is not the owner's duty, although he has resolved not to permit the company to complete the transportation, to take the cattle out of the cars, immediately after the train has passed, to prevent injury from confinement. If he takes them out at 9 o'clock on the following morning, he is not chargeable with any want of proper diligence in removing them: *Illinois Cent. R. R. Co. v. Waters*, 41 Ill. 73.

It is the duty of a railroad company to keep its platforms from which it loads livestock in such repair as to prevent the exposure of animals to injury: *East Tennessee etc. Ry. Co. v. Herrman*, 92 Ga. 384; and it is the duty of the company to provide a safe mode of delivery by having a platform suitable for the purpose of unloading stock: *Owen v. Louisville etc. R. R. Co.*, 87 Ky. 626. A carrier is required to furnish a safe chute for loading animals as well as safe cars for transportation. If a gangway, by reason of its rottenness, goes down and injury results, there is a failure of duty on the part of the carrier: *McCullough v. Wabash etc. Ry. Co.*, 34 Mo. App. 23. A shipper, in loading cattle, is not guilty of negligence in using an icy chute without sanding it, unless its use is glaringly dangerous. It is the carrier's duty to sand it, if necessary: *Kincaid v. Kansas etc. Ry. Co.*, 62 Mo. App. 365. A railroad company is bound to see that proper planking and guardrails are maintained at a bridge around which it is necessary for shippers of stock to go in looking after the animals: *Illinois Cent. R. R. Co. v. Foley*, 53 Fed. Rep. 459.

If a carrier receives a car overloaded with animals, it assumes all the responsibilities of a common carrier respecting it, and is not excused from liability, in case of injury, by the fact that the car was overloaded: *Kinnick v. Chicago etc. Ry. Co.*, 69 Iowa. 665. Compare *Huston v. Wabash R. R. Co.*, 63 Mo. App. 671. It is undoubtedly true that cars furnished for the transportation of livestock should be well ventilated; and, although a shipper, by special

contract, assumes the risk of suffocation in consequence of the animals being "crowded" into a car, yet this does not excuse the carrier from liability for the death of animals caused by reason of the "insufficiency of the ventilation" of the car: *Kansas City etc. R. R. Co. v. Holland*, 68 Miss. 351. If, however, a carrier offers to furnish a proper car, and the shipper, instead of waiting for it, but to subserve some purpose of convenience, crowds thirty-two head of cattle into an empty, close box-car, not suited to the purpose of carrying cattle, and the stock become distressed and damaged for want of air and ventilation, the carrier may plead the shipper's conduct in its own justification: *Huston v. Wabash R. R. Co.*, 63 Mo. App. 671, 676.

If a carrier undertakes to supply bedding for animals in transitu, the material must be of a kind not likely to occasion injury. If it provides straw, and a fire occurs from such use, whereby animals are injured or burned to death, the company is answerable for its negligence: *Powell v. Pennsylvania R. R. Co.*, 32 Pa. St. 414; 75 Am. Dec. 564. If the shipper accepts a car, and loads it with cattle, knowing that the car is not "bedded," the carrier is not answerable for negligence in failing to bed, or for insufficient bedding of the car: *East Tennessee etc. R. R. Co. v. Johnston*, 75 Ala. 596; 51 Am. Rep. 489. But, although a shipper has agreed to care for his own stock, the carrier must give him a reasonable opportunity to properly provide the animals with bedding. Hence, if a car turns out to be defective, and cattle therein have to be changed to another car, it is the carrier's duty to give the shipper a chance to bed such other car: *McDaniel v. Chicago etc. Ry. Co.*, 24 Iowa, 412.

*Duty to Prevent Escape.*—It is clearly the duty of a railroad company, which undertakes to transport livestock, to prevent the animals from escaping by reason of any defect in cars: *Indianapolis etc. Ry. Co. v. Strain*, 81 Ill. 504. If it negligently permits Texas cattle to escape from its custody while in transportation, it is answerable in damages for the loss of native cattle thereby infected with "Texas fever": *Grimes v. Eddy*, 126 Mo. 168; 47 Am. St. Rep. 653; and if it permits cattle to escape, from defects in its cars, even beyond the terminus of its road, it will be answerable for the loss, notwithstanding a special contract limiting its liability to the end of its road: *Indianapolis etc. Ry. Co. v. Strain*, 81 Ill. 504. It is the duty of the carrier to keep its appliances for fastening stockpens in repair, so that animals may not escape and injury be inflicted: *Texas etc. Ry. Co. v. Bigham*, 90 Tex. 223, 228; *Mason v. Missouri Pac. Ry. Co.*, 25 Mo. App. 473. It must not permit the fences of its stockpens to become rotten and insecure: *Cooke v. Kansas City etc. R. R. Co.*, 57 Mo. App. 471. If a stockpen is unsafe, and loss results from its condition, the carrier is liable, although the owner could have known of the condition of the pen. The carrier cannot absolve itself from liability by permitting its pens to become so dilapidated that the shipper will recognize them as unsafe: *Gulf etc. Ry. Co. v. Trawick*, 80 Tex. 270, 275. If animals escape, through their own efforts and exertions, without any negligence on

the part of the carrier, the latter, of course, is not answerable: *Blower v. Great Western Ry. Co.*, L. R. 7 Com. P. 655.

*Duty of General Supervision.*—Animals while being transported on cars or vessels may injure or destroy themselves or each other; they may die from fright or from starvation because they refuse to eat; or they may die from heat, or cold, or want of ventilation. It is, therefore, the carrier's duty to be reasonably careful and watchful over the animals during the entire journey to prevent them from injuring themselves, or each other, or from becoming injured in other ways, as by heat, cold, suffocation, etc.: *Baker v. Louisville etc. R. R. Co.*, 10 Lea, 304; *Kinnick v. Chicago etc. Ry. Co.*, 69 Iowa, 665; *Sturgeon v. St. Louis etc. Ry. Co.*, 65 Mo. 569; *Toledo etc. Ry. Co. v. Hamilton*, 76 Ill. 393; *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 205, and note thereto pp. 210, 212. Hence, the carrier must prevent stock, such as hogs, from "piling up," or becoming crowded: *Kinnick v. Chicago etc. Ry. Co.*, 69 Iowa, 665, 669; it must also guard against their suffocation, notwithstanding a special contract exempting it from liability for any loss by suffocation: *Sturgeon v. St. Louis etc. Ry. Co.*, 65 Mo. 569; and, where they are in danger of becoming overheated, it is the duty of the carrier to throw water on them to avert the danger: *Illinois Cent. R. R. Co. v. Adams*, 42 Ill. 474; 92 Am. Dec. 85; *Toledo etc. Ry. Co. v. Hamilton*, 76 Ill. 393; *Toledo etc. Ry. Co. v. Thompson*, 71 Ill. 434.

The duty of the carrier to provide food, water, and rest for stock in course of transportation is, in several of the states, declared by statute, and a penalty fixed for a failure to discharge it; but whether so declared, or not, it is the carrier's duty, if it can be done with reasonable convenience, to sidetrack a car, and either unload it, or afford the shipper an opportunity to do so, whenever, in the course of the transportation, the safety and welfare of the animals require that they be temporarily unloaded for rest, food, or water, or to appease their fright, or that they be differently loaded: *Coupland v. Housatonic R. R. Co.*, 61 Conn. 531; *Johnson v. Alabama etc. Ry. Co.*, 69 Miss. 191; 30 Am. St. Rep. 534. Thus, if the carrier's agents are informed that a mare, with a colt, is becoming frightened, is acting badly, and is in danger of being killed by further transportation, it is the carrier's duty, upon the request of the shipper's agent, to sidetrack the car at a place where they are next to stop, where that may reasonably be done: *Coupland v. Housatonic R. R. Co.*, 61 Conn. 531. So, if it is found that cattle, being transported in a railroad car with hogs, are suffering, the conductor of the train is not justified in refusing, upon the shipper's request, to lay out the car at a station, merely because the stockpen at that station is unsafe for hogs, it not appearing that the cattle could not be separately unloaded, or that the railway company was under no duty of having a pen safe for hogs as well as for cattle: *Johnson v. Alabama etc. Ry. Co.*, 69 Miss. 191; 30 Am. St. Rep. 534. But, where there is a special contract for the shipper, having only a few horses and some "emigrant movables," to care for his



own stock, and there is no agreement as to any layout along the route, and the stock can be fed and watered without leaving the car, it has been held that the owner does not, in the absence of a custom to that effect, acquire, by such special contract, a right to have the car stopped and laid out along the route for the purpose of resting his animals and rearranging his load, although a layout might save the horses from suffering and death, where the stock cannot be taken out without great trouble and delay, owing to their peculiar method of arrangement in the car. The shipper, it is said, has no right, under such circumstances, to demand that the car be laid out and afterward carried under the same contract. If he does not abandon his contract or contract anew for the use of the car for a longer time, the carrier may refuse to lay out the car, and is not answerable for injuries caused by continuing the transportation: *Illinois Cent. R. R. Co. v. Peterson*, 68 Miss. 454. This seems like a hard case, and one in which there was a violation either by the company, or by the shipper, of an obligation, "founded in common humanity," which required the dumb brutes to be relieved from suffering and to be rescued from death. But the case charged the shipper with the violation of duty, and, possibly, this ruling was correct, for it is undeniable that a carrier should not be held to account to the owner for an injury which is occasioned by the owner's own act. In fact, the authorities seem to support the rule that whenever livestock is transported in a car which is left in the exclusive control of the shipper or his agent, and injury or loss results from his act, whether negligent or not, the carrier is not guilty of any violation of duty: *Hart v. Chicago etc. Ry. Co.*, 69 Iowa, 485; *Fordyce v. McFlynn*, 56 Ark. 424; *Boaz v. Central R. R. Co.*, 87 Ga. 463; *Newby v. Chicago etc. Ry. Co.*, 19 Mo. App. 391; *Penn v. Buffalo etc. R. R. Co.*, 49 N. Y. 204; 10 Am. Rep. 355. Thus, if there is slight delay of a train carrying livestock, it is negligence in the shipper for his agent in charge of the livestock to refuse to feed and water the animals, if they demand such attention, and the proper facilities therefor are furnished by the railway company: *Fort Worth etc. Ry. Co. v. Daggett*, 87 Tex. 322. In short, the duty of feeding and watering stock and otherwise caring for them may be imposed upon the shipper or owner by the terms of the contract of shipment; and, if this is done, or if he volunteers or undertakes this duty, he alone is responsible for a neglect to discharge it: *Terre Haute etc. R. R. Co. v. Sherwood*, 132 Ind. 129; 32 Am. St. Rep. 239; *East Tennessee etc. R. R. Co. v. Johnston*, 75 Ala. 596; 51 Am. Rep. 489; *Kimball v. Rutland etc. R. R. Co.*, 26 Vt. 247; 62 Am. Dec. 567; *South etc. R. R. Co. v. Henlein*, 52 Ala. 606; 23 Am. Rep. 578; *Duvenick v. Missouri Pac. Ry. Co.*, 57 Mo. App. 550; *Central R. R. v. Bryant*, 73 Ga. 722; *Western Ry. Co. v. Harwell*, 91 Ala. 340.

The doctrine of the principal case that it is the custom of shippers to send a caretaker with livestock during their transportation, and that, in the absence of an agreement on the part of the carrier

to perform the duties of a caretaker, the shipper assumes all risks arising from his failure to comply with such custom, does not prevail in other jurisdictions. Carriers of livestock are, in the absence of special agreement, whereby the shipper is to look after his own stock, answerable not only for a safe and careful conveyance of the car containing them, but also for any injury which can be prevented by foresight, vigilance, and care, although arising from the conduct of the animals, and this responsibility is held, in many cases, not to be relieved by the fact that the owner of the stock is present and aids in loading them, and is allowed a passage for himself on the train which carries the animals: See note to *Rixford v. Smith*, 13 Am. Rep. 53; *Feinberg v. Delaware etc. R. R. Co.*, 52 N. J. L. 451. In *Clarke v. Rochester etc. R. R. Co.*, 14 N. Y. 570, 67 Am. Dec. 205, it was said that "the fact that the plaintiff was allowed a passage for himself on the train in which his horses were carried did not prove conclusively, if at all, that he was to attend to their safety during the journey. It may very well be that he desired to be present at the time and place of delivery, in order to take care of them there, and that the privilege of taking passage in the same train was allowed him for that purpose": Compare *Evansville etc. R. R. Co. v. Young*, 28 Ind. 516; *Cincinnati etc. Ry. v. Disbrow*, 76 Ga. 253, 262. And it has been held that a custom requiring an owner to go on the same train with his stock, to feed and water the animals, cannot be sustained, because the law imposes this duty on the carrier, and the latter cannot transfer it to the shipper by custom: *Missouri Pac. R. R. Co. v. Fagan*, 72 Tex. 127; 13 Am. St. Rep. 776. Evidence of a custom making it the duty of the shipper to accompany his stock is not even admissible in evidence, where it does not appear that the performance of such duty would have avoided the injury, or that its remission contributed thereto. Even if it is a custom for shippers of stock to accompany it, it may be a mere privilege, and not a duty of the shipper: *Richmond etc. R. R. Co. v. Trousdale*, 99 Ala. 389; 42 Am. St. Rep. 69. If a shipper expressly agrees to accompany his stock and to care for the animals, but does not do so, and such failure proximately contributes to the injury of the stock, the carrier is not, of course, answerable: *Western Ry. Co. v. Harwell*, 91 Ala. 340.

*Duty as to Delivery—Delay.*—While it is not the duty of a carrier of livestock to carry the animals through at all hazards, in the shortest possible time, it is its duty to exercise ordinary diligence in transporting the stock without unreasonable delay, and it must make such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee: *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 134; *Ormsby v. Union Pac. Ry. Co.*, 2 McCrary, 48; *Kinnick v. Chicago etc. Ry. Co.*, 69 Iowa, 665; *Richmond etc. R. R. Co. v. Trousdale*, 99 Ala. 389; 42 Am. St. Rep. 69; *Nashville etc. R. R. Co. v. Jackson*, 6 Heisk. 271; *Ball v. Wabash etc. Ry. Co.*, 83 Mo. 574; *Blanchard v. Chicago etc. Ry. Co.*, 60 Mo. App. 267; *Baker v. Louisville etc. R. R. Co.*, 10 Lea, 304;



Douglass v. Hannibal etc. R. R. Co., 53 Mo. App. 473; Gulf etc. Ry. Co. v. Ellison, 70 Tex. 491. It is the duty of a carrier of stock to transport them with reasonable dispatch, in view of the character of the freight, and its liability to injury from delay: Gulf etc. Ry. Co. v. Ellison, 70 Tex. 491. A delay of twenty-four hours at a station on the way is an unnecessary delay, unless excused. That a railroad company needed its rolling stock for the purpose of carrying passengers is not a sufficient excuse for delaying the transportation of a carload of horses, at a station on the way for twenty-four hours. "The duty of the company is to be prepared to execute its contracts, both to carry passengers and to carry freight; it cannot excuse itself for a failure to do the one, upon the ground that it was bound to do the other, and that it was not able to do both": Ormsby v. Union Pac. Ry. Co., 2 McCrary, 48, 50. If a train is delayed by a snowstorm, and cattle are put into a stockyard, the carrier is in duty bound to protect them from injury by cold and exposure: Feinberg v. Delaware etc. R. R. Co., 52 N. J. L. 451. A carrier of livestock is liable for all damage that is referable to a negligent prolongation of the transportation through its natural effect upon the physical condition, or latent vicious propensities of the animals, whereby they are reduced in strength, or weight, more than they would have been had prompt carriage and delivery been made, and injure each other in consequence of viciousness, aroused by the excess of their confinement beyond the time necessary for transportation and delivery: Richmond etc. R. R. Co. v. Trousdale, 99 Ala. 389; 42 Am. St. Rep. 69. If the cars can be stopped and started, while cattle are being transported, without doing it so abruptly as to throw the animals down and injure them, it is the company's duty to do it: Gulf etc. Ry. Co. v. Ellison, 70 Tex. 491.

*Duty Where Lines Connect.*—The duty of a railroad company which, without a special contract, receives livestock for transportation over its own line and other lines connected therewith, is to carry the animals over its own line only and to deliver them safely to the next connecting carrier: Myrick v. Michigan Cent. R. R. Co., 107 U. S. 102, 106. It is gross negligence for it to delay, for over three hours, in hot weather, the transfer, to a connecting line, of a carload of hogs, after its arrival, especially where repeated inquiries about the animals are made during that time: Rock Island etc. Ry. Co. v. Potter, 36 Ill. App. 590. If a carrier has contracted to carry livestock over his own road and deliver them to a connecting carrier, it is his duty, after the transit on his own road is completed, and the stock transferred to cars accepted by the shipper preparatory to delivery to the connecting carrying line, to either permit the consignor to put such cars in proper condition to safely transport the stock, as he had agreed to do, or himself perform this duty with reasonable care and diligence; and for a failure so to do, the carrier is answerable for a resulting injury to the stock. This duty includes the providing of suitable bedding for the cars, partitions to keep the animals apart, and the exercise of proper care to prevent the crowding of the stock in the cars: Alabama etc. R. R. Co.



**v. Thomas**, 89 Ala. 294; 18 Am. St. Rep. 119. If a railroad company, contracting to carry livestock to a point beyond its own line, finds, after reaching its own terminus, that the animals cannot be forwarded at once, and that, to prevent injury they should be unloaded, fed, and watered, it is the first carrier's duty to see that this is done. Such duty cannot be imposed on the owner, although he is caring for his stock under a contract that he shall do so during their transportation: **Dunn v. Hannibal etc. R. R. Co.**, 68 Mo. 268. A connecting carrier, receiving cattle for transportation, has the right to unload them for the purpose of transferring them to his own cars, if it can be done without unnecessary delay, where there is no express contract or special circumstances making it his duty to continue the transportation in the same cars in which the animals are delivered to him: **McAlister v. Chicago etc. R. R. Co.**, 74 Mo. 351. It is the duty of a connecting carrier to transport animals which have been tendered and received on Sunday for shipment: **Philadelphia etc. R. R. Co. v. Lehman**, 56 Md. 209; 40 Am. Rep. 415; **Guinn v. Wabash etc. Ry. Co.**, 20 Mo. App. 453.

*Duty on Vessels.*—If animals are transported on vessels, it is the duty of ferrymen and masters of the vessels to have proper appliances for the transportation: **Note to Clarke v. Rochester etc. R. R. Co.**, 67 Am. Dec. 212. It is also their duty to provide sufficient ventilation for the stock: **The Alvah**, 59 Fed. Rep. 630. Compare **The Mondego**, 56 Fed. Rep. 268. If it is absolutely necessary, during a severe storm at sea to sacrifice certain property, such as cattle, to preserve other property, or the vessel and crew, the sound stock should not be sent overboard along with the maimed, but it is the master's duty to separate and save the former, if possible: **Brauer v. Campania Navigacion La Flecha**, 66 Fed. Rep. 776, affirming the same case, 57 Fed. Rep. 403. A common carrier of cattle by steamboat is answerable for their loss during transportation, if occasioned by negligence or want of care on the part of the officers of the boat: **Pitre v. Offutt**, 21 La. Ann. 679; 99 Am. Dec. 749.

*Exemption from Performance of Duty.*—A common carrier of livestock may, by special contract, limit his common-law liability, thus decreasing his duties respecting the transportation of animals, but he cannot, by contract, exempt himself from the consequences of his own negligence as to any duty respecting such transportation, or from liability for injuries which may occur, during the transportation, through the negligence of his servants, as such a contract would be contrary to public policy: **Ball v. Wabash etc. Ry. Co.**, 83 Mo. 574; **Alabama etc. R. R. Co. v. Thomas**, 89 Ala. 294; 18 Am. St. Rep. 119; **Railroad v. Dies**, 91 Tenn. 177; 30 Am. St. Rep. 871; **Johnson v. Alabama etc. Ry. Co.**, 69 Miss. 191; 30 Am. St. Rep. 534, and note; collected cases in **Chicago etc. R. R. Co. v. Witty**, 32 Neb. 275; 29 Am. St. Rep. 436; **Gulf etc. R. R. Co. v. Trawick**, 68 Tex. 314; 2 Am. St. Rep. 494; **Hawkins v. Great Western R. R. Co.**, 17 Mich. 57; 97 Am. Dec. 179; **Louisville etc. R. R. Co. v. Hedger**, 9 Bush, 645; 15 Am. Rep. 740; **Chesapeake etc. Ry. Co. v. American Exchange Bank**, 92 Va. 495; **Missouri Pac. Ry. Co. v.**

Cornwall, 70 Tex. 611; *St. Louis etc. Ry. v. Lesser*, 46 Ark. 236; *Maslin v. Baltimore etc. R. R. Co.*, 14 W. Va. 180; 35 Am. Rep. 748; *Chicago etc. R. R. Co. v. Witty*, 32 Neb. 275; 29 Am. St. Rep. 436; *Ormsby v. Union Pac. Ry. Co.*, 2 McCrary, 48; *McCune v. Burlington etc. R. R. Co.*, 52 Iowa, 600; *Great Western Ry. Co. v. Hawkins*, 18 Mich. 427; *Union Pac. Ry. Co. v. Rainey*, 19 Colo. 225; *Nashville etc. R. R. Co. v. Jackson*, 6 Helsk. 271; *Doan v. St. Louis etc. Ry. Co.*, 38 Mo. App. 408; *Potts v. Wabash etc. Ry. Co.*, 17 Mo. App. 394; *Wabash etc. Ry. Co. v. Black*, 11 Ill. App. 465. Thus, the carrier may contract for just and reasonable exemptions from unusual risks incident to the service, such as overloading, suffocation, heat, fire, and the like, limiting his liability to injuries resulting from the negligence of his own servants and agents: *Western Ry. Co. v. Harwell*, 91 Ala. 340; *Georgia R. R. v. Beatle*, 66 Ga. 438; 42 Am. Rep. 75. Compare *Wabash etc. Ry. Co. v. Black*, 11 Ill. App. 465, holding that the carrier cannot limit his common-law liability to safely deliver stock received for transportation. He cannot stipulate for exemption on account of the insufficiency of cars for the transportation of livestock placed therein, although the shipper accompanies his stock and sees the defects or unsuitableness of the cars. The carrier cannot excuse negligence and carelessness in furnishing cars upon the ground that the shipper should have noticed the defects and rejected the vehicles: *Railroad Co. v. Pratt*, 22 Wall. 123; *Union Pac. Ry. Co. v. Rainey*, 19 Colo. 225; *St. Louis etc. Ry. v. Lesser*, 46 Ark. 236; *Peters v. New Orleans etc. R. R. Co.*, 16 La. Ann. 222; 79 Am. Dec. 578; *Mason v. Missouri Pac. Ry. Co.*, 25 Mo. App. 473; *Gulf etc. Ry. Co. v. Trawick*, 80 Tex. 270. As to limitation of liability, see, also, the note to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 213. A carrier may, however, limit his liability for animals, in case of injury, to a certain value, and it is due to him that he should be correctly informed by the shipper of the value of livestock tendered for transportation: *Coupland v. Housatonic R. R. Co.*, 61 Conn. 531; *Western Ry. Co. v. Harwell*, 91 Ala. 340; note to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 214. Contra, *Doan v. St. Louis etc. Ry. Co.*, 38 Mo. App. 408. In New York, however, the rule is that a carrier may, by express agreement, exempt himself from liability for damages resulting from any degree of negligence on the part of his agents, servants, or employes, and this rule applies to a carrier of livestock: *Cragin v. New York Cent. R. R. Co.*, 51 N. Y. 61; 10 Am. Rep. 559.

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## RIVARD v. RIVARD.

[109 MICHIGAN, 98.]

**APPELLATE PROCEDURE—QUESTIONS NOT PRESENTED TO THE TRIAL COURT.**—Cases will be reviewed by the appellate court only upon points and theories presented to the trial courts.

**WILLS, UNDUE INFLUENCE, WHAT SUFFICIENT TO SUPPORT A FINDING OF.**—If a testator possessed of great wealth makes a will in which his property is devised with substantial equality among his heirs at law, and subsequently by codicils, to the will and by conveyances, practically disinherits all of them but two, those two being less in need of his bounty than some of those disinherited, and it appears that one of the sons in whose favor the changes in the will were made resided with the testator for several years prior to his death, and the other was frequently a visitor of, and in consultation with, the testator, and that after interviews between them, he spoke unfavorably of the third son, a verdict finding that the will was the product of undue influence will not be set aside.

**PRACTICE.**—An objection to testimony showing that in the opinion of witness the testator was of unsound mind, that such testimony is incompetent, is too indefinite, because it may include reasons which counsel had in mind, but which were not apparent to the court. Counsel cannot, in an appellate court, insist that the testimony was incompetent, because the witness had not shown sufficient knowledge upon which to base his opinion.

**WITNESS, COMPETENCY OF TO GIVE OPINION AS TO SANITY.**—A witness who describes actions, looks, and language of the testator inconsistent with a rational state of mind, is competent to state his opinion respecting the sanity of the testator.

**APPELLATE PROCEDURE, OBJECTIONS NOT POINTED OUT IN THE TRIAL COURT.**—If counsel deem a hypothetical question asked of a medical witness to be objectionable in any respect, they should call the attention of the trial court thereto. If, after the close of the testimony, they think the question assumed facts of which there was no evidence, they should move to have the answer stricken out. Failing to take any action in the trial court, they cannot urge their objections on appeal.

**INSANITY—MORAL OBLIGATIONS.**—It is not error to permit a medical witness to be asked whether he thought the testator to be capable of understanding his moral obligations to others at the time of executing his will, if the testimony shows that he then had minor children dependent on him or his property for education and support.

**JURY TRIAL—INSTRUCTION AS TO WEIGHT OF EVIDENCE.**—A court before which the competency of a testator is being tried, does not err in refusing to instruct the jury that the expert testimony in the case is uncertain, unreliable, and entitled to but little weight.

**APPELLATE PROCEDURE, IMMATERIAL ERROR.**—A verdict will not be set aside for an error of the trial court in permitting a question to be answered on cross-examination having no relevancy to the examination in chief, and therefore not a proper subject for cross-examination, if it would be a reflection on the intelligence of the jury to hold that the answer could have misled or prejudiced them.

**INSANE DELUSIONS, EFFECT OF UPON TESTAMENTARY CAPACITY.**—A testator may have been competent to attend to his affairs, to make deeds, leases, and other contracts, and still not able to execute the will in question, because of some delusion which had beclouded or taken away his judgment in regard to those who were the natural objects of his bounty, as where he disinherits one of his heirs at law on account of his having a delusion respecting the character of such heir, or respecting some act on the part of the heir which, if existing, shows him to be unworthy of the testator's bounty.



**WILLS—TESTAMENTARY CAPACITY.**—Where monomania or insane delusion dictates the provisions of a will resulting in the disinheriting of the subjects of the delusion, whom the testator otherwise would remember in his will, it cannot stand.

**WILLS—TESTAMENTARY CAPACITY, TERMS OF WILL, WHEN MAY BE CONSIDERED.**—The jury may be instructed that they may consider the terms of a will in connection with other evidence in determining whether it was the fruit of monomania or insane delusion.

**WILLS.**—If a testator is under an insane delusion that his daughter is an inmate of a house of ill-fame, such delusion, if the jury finds it to have been the cause of his disinheriting her, is sufficient to invalidate the will.

**WILLS, EVIDENCE.**—That a will is contrary to natural justice may be considered with other facts to aid in determining whether it is the fruit of undue influence or insane delusion.

**AN INSANE DELUSION** on the part of a testator that one of his daughters is a prostitute, one of his sons a drunkard, and that his son in law had designs on his life, is sufficient to justify a verdict against the validity of the will.

Application to admit a will to probate with the several codicils thereto. The testator died in 1892 at the age of eighty-two years. The original will was executed in 1874, shortly after the death of his wife, and of the codicils one was executed in 1875, three in 1880, one in 1882, one in 1883, one in 1885, two in 1886, two in 1888, and one in 1890. When the will was executed the testator had three sons and four daughters, and under it his property was devised equally among them. By the codicils the property was substantially given to his sons Paul and Ephraim. One of his daughters married and bore eight children, but her husband, being a man of bad character, she ultimately left him with her father's approval, and with all her children went to his house and lived. Another daughter married a Mr. Lodewyck, and after bearing five children, died. About four months after her death, he married Rose, another daughter of the testator, against his wish. The trial court gave the jury numerous instructions at the request both of the proponents and the contestants, and also certain other instructions on its own account. None of the instructions, either oral or written, seem to have been objected to by either party, but the proponents excepted to the refusal of the court to instruct that there was no evidence of undue influence, that if the testator was of sound mind sufficient to enable him to buy and sell property, and to make deeds, leases, and gifts, then he had mental capacity sufficient to make a will, that if he was nervous, of violent temper, and unjust in his dealings or tyrannical, this did not prove anything against his testamentary capacity, and that

the expert evidence given in the case was uncertain, unreliable, and should be accorded little weight. Verdict and judgment for the contestants, the proponents appealed.

John Ward (Henry M. Cheever and John Atkinson, of counsel), for the appellants.

Don M. Dickinson (Samuel S. Harris and John D. Conely, of counsel), for the appellees.

<sup>109</sup> GRANT, J. 1. The court did not err in refusing to instruct the jury that there was no evidence of undue influence. It must be borne in <sup>110</sup> mind that the first will was a fairly equitable division of the testator's property among his children. This was in accordance with the natural affection which every father is supposed to have for his offspring. There is no evidence that any influence was exercised over Mr. Rivard in the execution of that will, or that there was then any alienation of affection between him and any of his children. If the case had been tried upon the theory that this will was valid, and must stand, although it were established that the codicils were invalid on account of undue influence or incompetency, a different and important question, upon which we find no decision by this court, would have been presented. It was, however, presented to the court and jury upon the theory that the execution of a codicil is a re-execution of the entire will, and that, if there was such undue influence or incompetency as would invalidate the codicils, it would invalidate the entire will. All through the trial the original will and the codicils were referred to as one will. No request was made to instruct the jury upon this theory. It was raised in this court for the first time. Cases will be reviewed by the appellate courts upon the points and theories presented to the nisi prius courts. No better illustration of the justice of this rule can be found than in the present case. Had the proponents desired to make this issue, it was their clear duty to have done so in the court below. We therefore refrain from discussing this question, or commenting upon the authorities cited.

Soon after the execution of the original will, Mr. Rivard commenced, by codicils, to diminish the shares of some and increase those of others, until finally, by these codicils and deeds of conveyance, he had practically disinherited all but Paul and Ephraim, and left to them almost the entirety of a property worth between two hundred and fifty thousand dollars and four hundred thousand dollars. Some of those whom he thus disin-

herited were in more need of his bounty than Paul and Ephraim, because they were less able to take care of themselves, and were possessed of less property. Every person will <sup>111</sup> naturally say that some good reason must be found to account for such a disposal of a large property by a parent. Undue influence is not exercised openly. Like crime, it seeks secrecy in which to accomplish its poisonous work. It is largely a matter of inference from facts and circumstances surrounding the testator, his character and mental condition as shown by the evidence, and the opportunity possessed by the beneficiary for the exercise of such control: *Marx v. McGlynn*, 88 N. Y. 357; *Hartman v. Strickler*, 82 Va. 237; *Porter v. Throop*, 47 Mich. 324. It is unnecessary in this case to go to the extent of the holding in *Marx v. McGlynn*, 88 N. Y. 357, and *Hartman v. Strickler*, 82 Va. 237, to the effect that the presumption of undue influence arises from the fact that the will is in disregard of a parent's natural affection. Ephraim lived at home, with his father, for about five years before his death. Paul was a frequent visitor, and in consultation with him. There is evidence on the part of the contestants that Mr. Rivard made remarks against his son Charles after his interviews with Paul, and spoke about fixing matters differently. The learned circuit judge submitted this question to the jury, and, upon a motion for a new trial, refused to disturb the verdict. We think he was correct, in that there was substantial evidence for the consideration of the jury.

2. Three witnesses, named Lodewyck, Frech, and Gore, testified that, in their opinion, Mr. Rivard was of unsound mind. The objection made to the inquiry propounded to Lodewyck and Frech was that it was "incompetent, and any inquiry as to his mental soundness or unsoundness must be confined to the time the will was made, and the codicils." Under this objection, counsel can now complain only of the second reason for their objection. The objection that it was "incompetent" is too indefinite. The term includes many reasons which counsel might have had in mind, but which are not apparent to the court.

In *Ward v. Ward*, 37 Mich. 258, the objection made <sup>112</sup> was that the question was "incompetent, irrelevant, and immaterial." The court said: "The ground of the objection was not stated at all, and, considering the circumstances, the point now urged was not so obvious as to probably occur to the judge's mind on the tender of a general objection. The plaintiff in error is therefore not entitled to insist on the ground here taken."



In *Stevens v. Hope*, 52 Mich. 65, it is said: "Objections made in this form are not entitled to notice, unless it happens that the true point of objection is too palpable to call for anything more definite": See, also, *Brown v. Weightman*, 62 Mich. 557; *Seventh-Day Adventist Pub. Assn. v. Fisher*, 95 Mich. 274.

Counsel cannot now raise the point that these witnesses had not shown sufficient facts and knowledge upon which to base an opinion.

To similar questions propounded to the witness Gore, the specific objection was made that he had not shown sufficient knowledge on his part to give an opinion. We are all of the opinion that this witness' testimony was competent. He had described looks and actions and language inconsistent with a normal state of mind. We deem it unimportant to state his testimony.

3. Dr. Johnson, a medical expert upon insanity, was produced as a witness for the contestants. A very long hypothetical question was propounded to him. It assumed the existence of certain facts, as all such questions do, which contestants claim they had given testimony to prove. After the statement, the question was, "What have you to say as to the mental condition of this man, from the time of his wife's death?" The answer was, "The history seems to be that of an insane person, so far as I can judge from the question." After this was answered, a second question was propounded, asking for the witness' opinion whether Mr. Rivard was "capable of comprehending his moral obligations to others, and the proper objects of his <sup>113</sup> bounty; the relations of his children and grandchildren to him; the situation and disposition of his property so as to hold these in mind; his obligations to others; his consideration of the objects of his bounty; his property, and the extent of it—so as to be able to make this will and these codicils of his own understanding."

It is now urged that this question was incompetent because it includes certain facts which are indicative of sanity, rather than insanity, and that the jury were given to understand by the question that they were inserted as indicative of insanity. No such objection was made upon the trial, and it will not now be considered by us. The court, of its own motion, did modify some of the hypothetical statements, which were eliminated from the question. If counsel for proponents objected to other statements, they should have called the attention of the court to them. The usual and better practice is to first introduce all the evidence to support the assumed facts stated in the hy-

pothetical question. If, however, after the close of the testimony, it be found that such question contains assumed facts which there is no evidence to support, opposing counsel should move to have the answer stricken out, and excluded from the consideration of the jury: *Wilkinson v. Detroit etc. Spring Works*, 73 Mich. 418. The competency of such questions is too well established to be now questioned. The duty of the trial judge is to limit the question to those facts which, if the jury find them to be true, are indicative of insanity. The hypothetical question in this case included the facts which the contestants had given evidence tending to sustain.

The second question was attacked in the court below, and is attacked here, upon the ground that it included moral obligations, and that it is of no consequence whether Mr. Rivard did or did not understand his moral obligations to others. It is insisted that the question and answer related to the moral incompetency of the testator, and not to his mental incompetency, which is the test. <sup>114</sup> The word was evidently not used in regard to the moral character of the testator, or his moral obligations to his neighbors in the business transactions of life. It related to the obligations which a parent owes to his children. He was under no legal obligation to devise his property or leave it to his children who were of age. Certainly, as to those who were not of age, it would not be inappropriate to say that a father owes a moral obligation to his children to provide out of his property the means for their support and education. The term was used with reference to his obligations to his children. The jury could not well have understood it in any other light. There is precedent for its use in this connection. The lord chief justice, in *Banks v. Goodfellow*, L. R. 5 Q. B. 549, says:

"Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion or aversion take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition due only to their baleful influence—in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand."

The rigid cross-examination elicited many things favorable to the proponents, and gave the jury all the essential information for their consideration in determining how much weight they

would give to the opinion of the expert. There was no error in admitting this testimony.

4. The court did not err in refusing to instruct the jury that the expert testimony in this case was uncertain and unreliable, and that but little weight should be given to it: *People v. Seaman*, 107 Mich. 348; 61 Am. St. Rep. 326.

5. Testimony was introduced by the contestants to show that Mr. Rivard became angry at some of his boys, and sent them away from home, telling them to leave, <sup>115</sup> and "go and eat mad cow." A Mr. Willemin was sworn for the proponents, and testified that he was a lawyer of forty-four years' practice, twenty years in this country, was brought up in Paris, a graduate of the French University, and acquainted with the idioms of the French language; that the French expression for the above is, "Mangé de la vache enragé"; that it was an expression much used in France, especially among the country people. "It means the same as, 'You go and have a hard time.' Suppose I should tell you the story of my life, and was in Australia part of the time, and fared very bad in that country; I would tell you, 'J'ai mangé de la vache enragé.' It means you have the hardest time one can ask, to endure hardships."

On cross-examination the witness was asked, "Would you use it to your own children?" He answered under objection and exception. It was probably not proper cross-examination. It had no relevancy to the subject matter of his testimony in chief. It would, however, be a reflection upon the intelligence of any jury to hold that they could be misled or prejudiced by the answer, which was: "No; I would not, myself." Judgments should not be set aside for such trivial errors.

6. The principles governing the main question in this case have been so frequently and fully discussed in the decisions of this court that we deem it unnecessary to traverse the ground again. To do so would be supererogation. The former distinguished jurists of this court have ably expounded the rules and cited the principles governing all the questions raised. Some of the leading cases are *Beaubien v. Cicotte*, 12 Mich. 459; *McGinnis v. Kempsey*, 27 Mich. 363; *Fraser v. Jennison*, 42 Mich. 231; *Kempsey v. McGinniss*, 21 Mich. 123.

Apart from the question of undue influence, which has already been disposed of, the theory of the proponents is that the record contains no evidence of general incompetency, the result of senile dementia or general insanity, or of an insane delusion which affected the testamentary <sup>116</sup> capacity of Mr. Rivard.



Counsel urged, and requested the court to so charge, that Mr. Rivard was competent to attend to his business affairs, to make deeds, leases, and contracts, and was therefore competent to make a will, for the reason that it requires less capacity to make a will than to execute deeds and contracts. If the alleged incompetency depended upon senile dementia or general insanity, counsel's contention, under the instruction of the court as to his competency in this regard, would be correct, and the court should have directed a verdict for the proponents. This rule is settled, not only by the authorities in Michigan, but is recognized by courts generally. The difficulty with this contention is that it does not apply to this case, and the court eliminated it from the consideration of the jury by instructing them that Mr. Rivard was competent to do all these things, and that that competency continued to the end of his life. Counsel ignore the other well-settled rule—that, while a man may be possessed of such capacity, he still may be unable to execute the will in question, on account of some delusion which has beclouded or taken away his judgment in regard to those who are the natural objects of his bounty. If a testator disinherits a daughter upon the belief that she is a bad woman or that she is not his own offspring, or a son upon the belief that he is a drunkard, or his grandchildren upon the belief that his son in law has threatened to kill him, and it appears that there is no foundation in fact for any such beliefs, and they are shown to be mere delusions, a will disinheriting such children and grandchildren is void, notwithstanding he was entirely sane upon every other subject, and fully competent to manage his business affairs. Justice Cooley makes the distinction clear in his able opinion in *Fraser v. Jennison*, 42 Mich. 231:

“When the monomania is conceded, it is only necessary to inquire further whether the provisions of the will are or are not affected by it, and the will stands or falls by that test. [Citing a large number of authorities.] A <sup>117</sup> man may believe himself to be the Supreme Ruler of the Universe, and nevertheless make a perfectly sensible disposition of his property; and the courts will sustain it, when it appears that his mania did not dictate its provisions.”

The converse of the proposition is true—that where the monomania or delusion does dictate its provisions, and results in the disinheritance of the subjects of the delusion, whom he would otherwise remember in his will, it cannot stand. We are not dealing with a testator who has no children, but only col-

lateral heirs, to whom he owes no duty, legal or moral, but with a parent, whose disinheritance ought, in the common sense of mankind, to be based upon some good reason. For this reason the court rightly instructed the jury that they might consider the terms of the will, in connection with the other evidence, in determining the question of the monomania or delusion. This is peculiarly true of the present case. These codicils present some peculiar features which indicate a loss of memory and an unstable character. There were only two weeks between the second and third; seventeen days between the eighth and ninth; five days between the tenth and eleventh; the third and fourth were made upon the same day; the eighth and ninth are identical in language. We find no satisfactory explanation of the execution of these two codicils within a few days of each other. By the sixth codicil he took away from his children all control of his funeral, burial, and selection of his grave and the erection of a monument, and committed it to his attorney, Mr. Ward. He disinherited his youngest daughter. If the testimony of the contestants is worthy of belief, he was under the insane delusion that she was an inmate of a house of ill-fame.

There is no shadow of a reason shown for this belief. If the jury found that this insane delusion was the cause of his disinheriting her, it alone would be sufficient to invalidate the will: *Haines v. Hayden*, 95 Mich. 332; 35 Am. St. Rep. 566. The delusion in that case was that his wife was unfaithful <sup>118</sup> to him, and that Alice, the daughter who was disinherited, was not his own child.

It was said in *McGinnis v. Kempsey*, 21 Mich. 123, "If a party makes a will contrary to natural justice, this, with other facts, may be considered." The testator's daughter Rose was about twelve years of age when her mother died. The evidence for contestants showed that she assumed the mother's place in the household; did most of the work; she and her little sister milked the cows, and brought water from the lake, several hundred feet away; that she was faithful, obedient, and uncomplaining; that her lot was a hard one; that she did work which no father, possessed of the property which her father had, ought to permit a daughter to do. Nothing occurred to estrange him from her until her marriage with Lodewyck. There is no evidence that he had any ill-will toward Pauline, Lodewyck's first wife. Either from an unfortunate marriage, or from other causes, the mind of his daughter Archange had become unbalanced, and after she left her husband her father took her to an asylum for

care and treatment. The common sense of mankind condemns, as contrary to natural justice, a will which practically disinherits such children, and leaves the bulk of a large fortune to two who have done no more than they to deserve it; and are better able to meet the vicissitudes and struggles of life; and courts and juries have the right to take that fact into consideration, in determining the competency of the testator to make the will.

The delusions claimed to directly affect the will are his belief that his daughter Julia, whom he totally disinherited, was an inmate of a house of ill-fame; that Charles was a drunkard; and that his son in law Lodewyck, whose children he left with a mere pittance, and that tied up with harsh restrictions, had designs upon his life. So far as disclosed upon this record, there was not the slightest foundation for his belief in the unchastity of his daughter or the designs of Lodewyck. There is evidence <sup>119</sup> from which it may be reasonably inferred that he had some foundation for his belief in the habits of his son Charles. Charles, however, was a witness, and the jury had a better chance to judge as to the foundation for his father's treatment, and whether his belief amounted to a delusion.

The evidence of the contestants tends to show a marked change in the habits and character of Mr. Rivard after the death of his wife; that he was afraid of her spirit; that he made his sons and the hired man sleep in the sitting room for some time, all having beds on the floor; that they slept with their guns by their sides; that he said to his sons, "Your mother might come, and we had better sleep on the floor"; that he told them to sleep on their backs, so as to listen, for fear she would come, and told them to be ready to grab their guns to shoot if she should come; that he hung sleighbells across the windows; that he attended to the calls of nature in the room at night without using any convenience; that he was accustomed to sit upon his haunches in the house and in the fields, and along the fences; that he exhibited cruelty toward his dumb animals, so extreme and revolting as to be inconsistent with a sane mind; that he sometimes wore summer clothes in winter, and winter clothes in summer; that he sometimes slept with a flannel shirt or drawers tied about his neck, for fear that one of his daughters would cut his throat; and that he furnished diseased meat to eat. Now, while some of these peculiarities would not, of themselves, show incompetency to make a will, still they were important side lights to aid the jury in determining the main issue in the case: *Bitner v. Bit-*



ner, 65 Pa. St. 347. It is just to here remark that the testimony of the proponents was in flat contradiction to most of the testimony on the part of the contestants, and, if the jury found that the facts testified to by the proponents' witnesses were true, Mr. Rivard was undoubtedly competent to execute the will, and the will should have been sustained. But these questions of fact <sup>120</sup> were exclusively within the province of the jury, and they have settled them against the proponents. The charge was very clear in presenting the issue to them, and defining the rules by which they were governed. We find no error in the instruction given, or in the refusal to give the requests on behalf of the proponents which were refused.

The refusal to submit the special questions numbered 4 and 5 has not been argued by counsel in their briefs, and therefore will not be considered.

The judgment is affirmed.

The other justices concurred.

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**APPEAL—QUESTIONS NOT RAISED AT TRIAL.**—A question not raised at the trial will not be considered for the first time on appeal: *Reich v. Cochran*, 151 N. Y. 122; 56 Am. St. Rep. 607, and note; *Klotz v. James*, 96 Iowa, 1; 59 Am. St. Rep. 348; *Greene v. Greene*, 49 Neb. 546; 59 Am. St. Rep. 560.

**INSTRUCTIONS AS TO WEIGHT OF EVIDENCE.**—It is never the province of the court to tell the jury which class of conflicting testimony is entitled to the greater weight: *West Chicago Street Ry. Co. v. Mueller*, 165 Ill. 499; 56 Am. St. Rep. 263; *McKeon v. Chicago etc. Ry. Co.*, 94 Wis. 477; 59 Am. St. Rep. 910, and note.

**WILLS—CONTEST—OPINION OF WITNESS AS TO TESTATOR'S MENTAL CAPACITY.**—If a witness has had such a long and intimate acquaintance with a testator as to enable him to form a correct judgment as to the testator's mental condition, he may give his opinion that the testator was of sound mind, provided he also states the facts upon which such opinion is based: *Note to Kimberly's Appeal*, 57 Am. St. Rep. 111. See *Estate of Goldthorpe*, 94 Iowa, 336; 58 Am. St. Rep. 400.

**WILLS—INSANE DELUSION AFFECTING.**—A man may be of sound mind in regard to his dealings in general while he is under an insane delusion, and whenever it appears that his will was the direct offspring of his partial insanity or monomania, which was the cause of the disposition made by him of his property, and that without it such disposition would not have been made, it should be disregarded: *Thomas v. Carter*, 170 Pa. St. 272; 50 Am. St. Rep. 770, and note; *Kimberly's Appeal*, 68 Conn. 428; 57 Am. St. Rep. 101, and note. The question is as to whether or not the will is the offspring of the delusion: *Taylor v. Trich*, 165 Pa. St. 586; 44 Am. St. Rep. 679, and note. While an unjust will is not necessarily an irrational act: *Lee v. Lee*, 4 McCord, 183; 17 Am. Dec. 722; its injustice may be considered as evidence of the testator's mental condition: *Clark v. Fisher*, 1 Paige, 171; 19 Am. Dec. 402; *Higgins v. Carlton*, 28 Md. 115; 92 Am. Dec. 666.

**WILLS.—THE UNDUE INFLUENCE** which will invalidate a will must be such as operates upon the mind of a testator at the

time of making the will, and must be an influence relating to the will itself: In re Kaufman, 117 Cal. 288; 59 Am. St. Rep. 179, and note. On the subject see the monographic note to In re Hess' Will, 31 Am. St. Rep. 670-691.

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## WHEELOCK v. AMERICAN TRACT SOCIETY.

[109 MICHIGAN, 141.]

**CHARITABLE USES.**—A bequest of property to trustees to pay such worthy poor girls to aid in their education as the judgment of the trustees shall have dictated, they having full power as to the amounts to be paid and the times of payment, is ineffective and must fail.

**CHARITABLE USES—DISCRETION OF THE TRUSTEES, WHEN AVOIDS.**—A bequest to trustees to be applied to useful and charitable purposes, that is to say, they are to dispose of the property in such sums as in their discretion they shall think proper and right, that is, to pay to four associations, naming them, expressing also a desire to aid worthy poor girls in their education and giving the trustees authority to devote to that purpose sums not turned over to such associations, is void under the statutes of Michigan, because the trust is not fully and clearly expressed.

Suit for the construction of the following will:

"I, Sarah W. Wheelock, of the township of Athens, county of Bradford, and state of Pennsylvania, being of sound mind, do make and publish this my last will and testament. And, first, as to such worldly estate as it hath pleased God in His mercy to intrust me with, I dispose of as follows: I direct that all my funeral expenses be paid as soon after my decease as possible, out of the first moneys that shall come into the hands of my executors. And, as to the residue and remainder which shall remain in the hands of my executors, that the same may be applied to useful and charitable purposes, it is my will, and I hereby direct my executors, hereinafter named, to dispose of the money that may come into their hands from my estate, whether the same be from real or personal property, to such charitable and Christian purposes as hereinafter named, in such sums and portions as, in their discretion, they shall think proper and right; and for such purposes I do hereby give and bequeath to Moses W. Wheelock and Mrs. Charlotte Fairbanks (my executors, hereinafter named) all my property, of whatever kind or nature, in trust and for the uses hereinafter set forth; that is, to pay the same to the 'American Board of Foreign Missions,' to the 'American Tract Society,' to the 'American Home Mission,' and to the 'American Female Guardian Society,' incorporated by the legislature of New York in the year 1849. And should my executors think it best to appropriate a portion of the moneys

which may come into their hands, which shall not be expended and paid as hereinbefore set forth—and as to the amount to be paid, or sums to be distributed, to each, I leave entirely to the judgment and discretion of my executors to act in this respect as they shall think right—it is my wish and desire, and they are hereby directed, to pay to such worthy poor girls, to aid in their education, such sums as shall not be expended or paid as hereinbefore provided; said donees to be chosen by my executors, they having full power as to the amounts to be paid, and the times of payment, appropriating the same as their goodness and judgment shall dictate. I give and bequeath the best of my wardrobe to Mrs. Charlotte Fairbanks. And I hereby nominate, make, and appoint my beloved brother, Moses W. Wheelock, my executor, and my friend, Charlotte Fairbanks, my executrix, to this, my last will and testament.

“In witness whereof, I have hereunto set my hand, to this, my last will and testament, written on one sheet of paper, A. D. March 25th, 1858. SARAH W. WHEELOCK.

“Signed by Sarah W. Wheelock in our presence, as her last will and testament:

“H. W. PATRICK.

“N. C. HARRIS.”

Section 5616 and subdivision 5 of section 5573, Howell's Statutes, are as follows:

“Sec. 5573. Express trusts may be created for any or either of the following purposes:

“5. For the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations as to time prescribed in this title.”

“Sec. 5616. When a disposition under a power is directed to be made to, or among, or between several persons, without any specification of the share to be allotted to each, all the persons designated shall be entitled to an equal proportion.”

Hulbert & Mechem, for the complainant.

Swayne, Swayne & Hayes, for the defendants.

143 HOOKER, J. The complainant is administrator with the will annexed of Sarah W. Wheelock, and files this bill to obtain a construction of the will, a copy of which is appended. This will was made when the testatrix was a resident of Pennsylvania, and her estate was administered nearly to the point of dis-



tribution before the will was discovered. The persons named in the will as executors died before the will was discovered—one before the death of the testatrix, and one after. The estate consists of real estate, there being little personal property, and this will be required to pay the expenses of the administration. The circuit judge held the provisions of the will void.

The complainant contends that the will is inadequate to the creation of a trust, while the four corporations mentioned seek to uphold its validity. This must depend upon two questions: 1. Does the will comply with subdivision 5, section 5573, of 2 Howell's Statutes? 2. If so, does it fail by reason of the death of the trustees named in the will?

Whether or not this trust is fully expressed and clearly <sup>144</sup> defined upon the face of the instrument creating it, as required by subdivision 5, section 5573, of 2 Howell's Statutes, must depend upon the construction of this will. It is agreed by all parties that the provision for "poor and worthy girls" is ineffective, and must fail. So far as that provision is concerned, the trust is not fully expressed or clearly defined. On the other hand, the provision for the four societies is not open to that objection, and may stand unless it is inseparably connected with the other provision, and must fall with it.

A similar will was considered in the case of *Tilden v. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487, where this interesting question will be found elaborately discussed. In that case the residuum of the estate was devised in trust, to be devoted to some objects to be worked out through a prospective corporation, which the trustees were authorized to cause to be created, if possible, but subject to the power of the trustees to divert the fund, or any part of it, from that object, and apply the same to general charity, if they deemed it inexpedient or the corporation should not be organized. The court held that the will indicated that the testator had in view one general scheme of charity, and that all the provisions of the will were inseparably connected, and must fall, inasmuch as some of them, like the provision for "poor girls" in this will, were vague and indefinite, and inasmuch as the will designated no beneficiary who might enforce the trust. The attempt to maintain that the Tilden trust was the primary object of the testator's bounty was similar to the claim made here that the four societies were intended to be the first objects to be considered.

We do not fail to note the distinction urged by counsel that this will indicates that some provision, be it never so small, was,

by the terms of this will, assured to these societies, or one of them; but if this can be said to be so, in view of the fact that the "poor girls" were mentioned, and of the statute (2 How. Stats. sec. 5616), we are still impressed by the fact that the testatrix apparently <sup>145</sup> intended that the interests of the "poor girls" should be weighed by the trustees before determining how the estate should be divided. As said in *Tilden v. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487: How could the trustees, charged with the imperative duty of devoting the estate to charitable purposes, consider the question whether they should give the four societies anything, or (if, as contended, each was entitled to something) more than a nominal sum, without taking a complete view of the whole field of charities embraced within the provisions of the will? We think the case is within the rule maintained in the *Tilden* case, and that the view taken by the learned circuit judge was correct, and that the decree should be affirmed. The other question need not be discussed.

Decree affirmed.

The other justices concurred.

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**CHARITIES—WHEN WILL BE SUSTAINED.**—Gifts to charitable uses are highly favored and liberally construed to accomplish the intent of the donor: *Woodruff v. Marsh*, 63 Conn. 125, 38 Am. St. Rep. 346, wherein an interesting bequest to charity is upheld. A trust without a beneficiary who can claim its enforcement is void, and the objection is not obviated by the existence in the trustees of a power to select a beneficiary, unless the claim of the persons in whose favor the power may be exercised has been designated with such certainty that the courts can ascertain who were the objects of the power: *Tilden v. Green*, 130 N. Y. 29; 27 Am. St. Rep. 487, and note. A consideration of the charitable bequests which have been upheld, though attacked for uncertainty, and those refused enforcement because of uncertainty or indefiniteness, reveals many apparent inconsistencies and contradictions: See extended note to *Bridges v. Pleasants*, 44 Am. Dec. 98-101; *Dye v. Beaver Creek Church*, 48 S. C. 444; 59 Am. St. Rep. 724; note to *Minot v. Baker*, 9 Am. St. Rep. 720, 721; *George v. Braddock*, 45 N. J. Eq. 757; 14 Am. St. Rep. 754, and note; *Going v. Emery*, 16 Pick. 107; 26 Am. Dec. 645, and note; *Moore v. Moore*, 4 Dana, 354; 29 Am. Dec. 417; monographic note to *Hoeffer v. Clogon*, ante, pp. 248-269.

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## HAWES v. DETROIT FIRE & MARINE INSURANCE CO.

[109 MICHIGAN, 324.]

**MORTGAGE DEBT, OPTION AND ELECTION TO TREAT AS DUE.**—Where a mortgage provides that in the event of default in the payment of interest, the principal sum shall become due and payable immediately, notice need not be given to the mortgagor of an election to treat the whole amount of the debt as due. The election is sufficiently manifested by commencing a suit to foreclose.

**JUDICIAL SALE MADE EN MASSE.**—Where a mortgage includes several tracts of land, one of which is shown to be platted and laid out in lots for the purpose of selling as such, a sale under foreclosure of the whole property en masse should be vacated.

**PARTIES.**—A suit to set aside a foreclosure sale for irregularities thereunder is in effect a suit to redeem, to which the wife of the complainant should be made a party.

**JUDICIAL SALES—IRREGULARITIES, REMEDIES FOR.** Where a mortgagor seeks to set aside a foreclosure sale on account of irregularity in selling parcels en masse, he must either offer to make payment of the sum due or to submit to a sale of the premises in proper parcels to satisfy the sums due.

Hawes & Luby (A. J. Miles, of counsel), for the complainant.

Moore & Goff, for the defendant.

**325 MONTGOMERY, J.** Complainant filed a bill to set aside a deed made on a statutory foreclosure of a mortgage executed by himself and wife. The mortgage contained a provision that in case of default in payment of the interest at its maturity, continuing for a period of thirty days, the principal sum, with all the arrearages of interest, should become due and payable immediately. The property mortgaged was described in the mortgage as follows:

“The southwest quarter (160), one hundred sixty acres, and the southerly thirty (30) acres of the east half of the northwest quarter, section number nineteen (19); also, that portion of the north half of the southeast quarter of said section nineteen (19) lying west of the Comstock road (so called), and north of a private way, marked on the plat of the subdivision of said Hawes as lots numbers six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), except the easterly half of said lots six (6), seven (7), and eight (8), containing about thirty-one (31) acres; all in township two (2) south, range ten (10) west.”

At the time of the foreclosure of the mortgage, three installments of interest were past due; and the mortgagee, assuming to act under the option contained in the mortgage, claimed, in obtaining notice of sale, that the whole amount was due, and sold the property for the whole amount. The property was not sold in parcels, but as a whole. The two principal grounds of complaint made against the regularity of the proceeding are that there had been no previous notice of the intention to declare the whole amount due, and that the property should **326** have been sold in parcels. The circuit judge sustained the claim of the complainant as to each of these contentions, set aside the sale, and decreed a sale of the premises in parcels to satisfy the amount of the interest due. Defendant appeals.



1. By the clear weight of authority, notice of election to treat the whole amount of the mortgage debt as due before proceeding to foreclose is not necessary. The procedure to foreclose sufficiently shows the mortgagee's intention: *Harper v. Ely*, 56 Ill. 179; 2 *Jones on Mortgages*, sec. 1182; 2 *Pingrey on Mortgages*, sec. 1539, and cases cited; *Johnson v. Van Velsor*, 43 Mich. 208.

2. The mortgagor, when applying for the loan, proposed at first to include only that portion of the land not platted, but stated in the letter requesting a loan that, if thought necessary, he would cover the platted portion, which he held for sale. This was described in the correspondence as celery land. When the mortgage was made, an agreement permitting the mortgagor to sell this land, or any portion of it, at eighty dollars per acre, was made. As a matter of fact, this description of land was not used in connection with the other portions of the farm, but was held for sale in parcels as platted. While this plat was not recorded, it was recognized by the mortgagee, and the property was described by reference to it. We think, under these circumstances, it cannot be said to comprise, with the remaining portion, one farm; and the sale must be said to be, for this reason, irregular.

3. It is contended by the defendant that the remedy of complainant is by bill to redeem. The practice in such cases is pointed out in *Fosdick v. Van Huse*, 21 Mich. 567, and *Huyck v. Graham*, 82 Mich. 357, and it rests upon the principle that he who seeks equity must do equity; and, as complainant asks relief in equity, he should either be prepared to make payment, or have a sale of the premises for the amount due. For this purpose the complainant's wife should have been made a party. The case will be remanded, with leave to complainant to <sup>327</sup> make his wife a party complainant, and on failure to do so within thirty days the bill will be dismissed. Upon her being made a party, a decree should be entered permitting complainants to pay the amount of the mortgage and interest within sixty days, and, in default thereof, decreeing a sale of the premises in parcels to satisfy the amount of the mortgage, principal and interest, and costs. Neither party will recover costs in the court below. Defendant will be entitled to recover costs in this court.

Grant, Hooker, and Moore, JJ., concurred.

Long, C. J., did not sit.

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**MORTGAGE — OPTION — ELECTION TO FORECLOSE.** — If a mortgage provides that the note secured thereby shall become due and payable in thirty days after default in the payment of interest,

the mortgagee has a right, upon the expiration of thirty days from such default, to proceed to foreclose his mortgage. Bringing such suit is sufficient election to exercise his option, and is all the notice required: *Swearingen v. Lahner*, 93 Iowa, 147; 57 Am. St. Rep. 261, and note.

**MORTGAGE — FORECLOSURE SALE EN MASSE — WHEN VOID.**—A sale in a lump of several distinct parcels of land covered by one mortgage, upon foreclosure, is ground for setting aside the sale and ordering a resale: *Lay v. Gibbons*, 14 Iowa, 377; 81 Am. Dec. 487, and note; *Piel v. Brayer*, 30 Ind. 332; 95 Am. Dec. 699, and note. See *Street v. Beal*, 16 Iowa, 68; 85 Am. Dec. 504.

**MORTGAGE — REDEMPTION — PAYMENT ESSENTIAL.**—A mortgagor going into equity to redeem will be required to pay not only the mortgage debt, but all other debts due from him to the mortgagee: *Lee v. Stone*, 5 Gill & J. 1; 23 Am. Dec. 589; *Chamberlain v. Thompson*, 10 Conn. 243; 26 Am. Dec. 390. See, however, *Mahoney v. Bostwick*, 96 Cal. 53; 31 Am. St. Rep. 175, and note.

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## DEFREESE *v.* LAKE.

[109 MICHIGAN, 415.]

**LIFE ESTATE, WHEN CREATED.**—A devise of property to testator's son and after his decease to belong to his heirs, gives him an estate for life only.

**WILLS.—EXTRINSIC EVIDENCE** of what the testator told the scrivener whom he engaged to draw his will, and of his intentions as then expressed, is not admissible for the purpose of construing such will, where, upon its face, it is free from ambiguity.

**A LIFE TENANT OF REAL PROPERTY** owes both the estate and the remainderman the duty of paying taxes thereon, and therefore cannot acquire title in fee by letting the premises be sold for taxes and then bidding them in.

**DEVISE, ASSENT TO OR ACCEPTANCE OF.**—If the acceptance of a devise may be presumed, the presumption is not conclusive, and such acceptance is necessary to vest title in the devisee.

**DEVISE, RENUNCIATION OF, HOW MAY BE PROVED.**—Evidence that a devisee of a life estate in expectancy, before he became entitled to possession, purchased the property, at a tax sale, and thereafter claimed and conveyed in fee, is admissible as tending to show that he never accepted the devise, but, on the contrary, renounced it.

**TAX TITLE, WHO MAY NOT ACQUIRE AND ASSERT.**—Where land is devised to A for life with remainder to B for life, and after B's death, the property to go to his heirs, and B accepts the devise, he cannot, by purchasing the property at a tax sale during the life of A, acquire any title which he can assert for the purpose of cutting off the interest of his heirs as remaindermen. It would be otherwise if he never accepted the devise.

**LIFE TENANTS AND REMAINDERMEN.**—If there is an encumbrance upon land, either the life tenant or the remainderman may purchase it, but cannot hold it to the exclusion of the other, who is willing to contribute his share of the amount paid for the purchase. This rule is applicable to a life estate in expectancy.

**REMAINDERS ARE** descendible devises and alienable in the same manner as estates in possession.

A CONVEYANCE by the heirs of C made in his lifetime passes their title, if, as such heirs, they are remaindermen, he having merely a life estate in possession.

PERPETUITIES.—A devise of an estate to A for life with remainder to B does not suspend the power of alienation for a period longer than two lives in being, and hence does not create a perpetuity.

Watson & Chapman, for the appellants.

John T. McCurdy, for the appellee.

417 HOOKER, J. One Peter Casler, being owner in fee of the premises in controversy, made a will which contained the following provisions: "I give and bequeath to my wife, Betsey Casler, all the west half of the southeast quarter, and the south half of the east half of the southeast quarter, except so much of said land on the south as will make forty acres, on section thirty-one, according to the original survey of the United States, being in the township of Shiawassee, county of Shiawassee, and state of Michigan, it being the same farm on which I now reside. After her decease the said real estate above described I give and bequeath to Henry Casler, my son, and after his decease said real estate is to belong to his heirs."

It appears that during the time that Betsey Casler occupied the land, it was assessed for taxes to her for the years 1874 and 1875. It was sold for these taxes, and tax deeds were executed to Henry Casler on December 9, 1876, and December 13, 1877. After the testator's death, his widow, Betsey Casler, entered and occupied the premises until her death, which occurred in September, 1877. Afterward, Henry Casler entered and held possession until November 7, 1879, when he conveyed the premises to John A. Lake by warranty deed. Mary Lake is the wife of John Lake, and, at the time this action of ejectment was brought against them, resided with him upon the premises. Henry Casler died September 15, 1886, leaving issue. The plaintiff claims title to the land in question under quitclaim deeds obtained from the descendants of Henry Casler, executed and delivered before his death; also, a quitclaim deed purporting to have been given by other persons, styling themselves "heirs at law of Peter Casler, deceased," dated after Henry's death. Some of them were admitted to be heirs 418 at law of Henry Casler. Thus we find the plaintiff claiming title, and a right to recover the premises, by virtue of a deed from Henry Casler's heirs, while the defendants are in possession, claiming under a deed from Henry Casler himself. The plaintiff contends: 1. That Henry Casler took



only a life estate, with remainder to his heirs; 2. That the purchase of the lands at tax sale inured to the benefit of the remaindermen, and title, as against them, cannot be claimed under such deeds.

On the other hand, the defendants say that Henry Casler took title in fee simple, under the will, and that, failing in that, his tax deeds gave him such title.

The will has been quoted. It conveyed a life estate to Betsey Casler, with remainder to her son Henry. So far there can be no dispute. Was this a remainder in fee simple? Obviously, this must depend upon the construction to be given the words, "I give and bequeath to Henry Casler, my son, and after his decease said real estate is to belong to his heirs." Does this language evince an intention upon the part of the testator to limit Henry's interest to an estate for life? If the intention had been to devise an estate in fee simple, the most apt and proper words would have been, "I give and devise to Henry Casler, my son, his heirs and assigns forever." An equally effective and perhaps common method of expression would be, "I give and devise to Henry Casler, my son," the law in such case supplying the necessary words to create the estate in fee simple. But this testator used neither expression, but added to the devise to Henry the provision that after his decease "said real estate should belong to his heirs"—words which necessarily imply that Henry Casler was to have only a life estate, if they are not to be treated as superfluous.

We are not without precedents in this state which warrant the conclusion that this devised a life estate. <sup>410</sup> *Fraser v. Chene*, 2 Mich. 81, construed a will in which the following language was used: "I give and bequeath to my beloved son Gabriel Chene, my eldest, the farm I now reside on, for and during his lifetime, with all the appurtenances thereon; and after he, my said son, the said Gabriel Chene, is deceased, then the right, title, and appurtenances of the aforesaid farm is to become the property of said Gabriel Chene's male heirs." The court said: "It would seem to any one reading the will in this case that the intention of the testator to give a life estate only to his son Gabriel was so very plain that it could not be doubted."

In the case of *Gaukler v. Moran*, 66 Mich. 354, the testator devised premises to a daughter "during her natural lifetime, and after her death to her heirs and assigns." This was held to give the daughter a life estate merely: See, also, *Cousino v. Cousino*, 86 Mich. 323; *Jones v. Deming*, 91 Mich. 481.

We are of the opinion that the words used indicated a plain intention to give to Henry Casler a life estate only. This being so, the statute (2 How. Stats., sec. 5544) applies, and the heirs of Henry Casler take as purchasers. This may seem at variance with the case of *Fraser v. Chene*, 2 Mich. 81, but it is not, as the will in that case antedated the statute.

One Hartwell testified on behalf of the defendants that he drew the will, and that he had a conversation with the testator, at the time the will was drawn and executed, in regard to the provision hereinbefore mentioned, and that he understood the testator to wish Henry to have the land "in his own name, free"; that the witness "was in doubt, some, how to word the will, as it was new business to him"; and that "he asked the testator particularly what he wished—how he wished the estate disposed of after his death—whether Henry was to be allowed to use it all, or keep it in trust," and he said: <sup>420</sup> "It is no matter. Henry will not have anything left, anyway. It is all for Henry."

"Q. Did you understand you were creating a fee simple? A. Yes, sir. Q. By the use of those words? A. Yes, sir."

This testimony was afterward stricken out, on motion of plaintiff's counsel, upon which error is assigned. There was no ambiguity on the face of the instrument, and the testimony was not admissible: *Fraser v. Chene*, 2 Mich. 81; *Kinney v. Kinney*, 34 Mich. 250; *Waldron v. Waldron*, 45 Mich. 354; *Forbes v. Darling*, 94 Mich. 625.

It being settled that Henry Casler's title to the premises, acquired through the will, terminated at his death, we will next consider the question of the tax titles. It will be remembered that he procured a tax deed of the premises before the termination of Betsey Casler's estate. These taxes were properly assessed to Betsey Casler, who owed the duty of payment, both to the state and to the remaindermen: *Jenks v. Horton*, 96 Mich. 13; *Smith v. Blindbury*, 66 Mich. 319. But Henry Casler was in a different situation. He certainly owed no duty of payment to the state, though his interest in the premises was liable to sale therefor. It is a general proposition that a life tenant to whom taxes are assessed, and upon whom the law imposes the burden of such taxes, cannot acquire the title in fee by allowing the premises to be sold for taxes, and bidding them in, thus cutting off the remaindermen. But in this case Henry Casler was not a life tenant in possession, and, so far as the record shows, he had not done anything tending to show whether or not he had accepted the devise prior to the time he obtained his tax deeds,

which manifestly he was under no obligation to do unless he chose: 2 Redfield on Wills, 304, and cases cited; Doe v. Smyth, 6 Barn. & <sup>421</sup> C. 116; 4 Kent's Commentaries, 534; Townson v. Tickell, 3 Barn. & Ald. 31; 2 Story's Equity Jurisprudence, secs. 1075-1079.

In 3 Washburn on Real Property, page 6 (\*402), the author says: "An heir at law is the only person who, by the common law, becomes the owner of land without his own agency or assent. A title by deed or devise requires the assent of the grantee or devisee before it can take effect." Again, at page 579 (\*700), the author says: "It is hardly necessary to add that no one can make another the owner of an estate against his consent, by devising it to him; so that, if the devisee disclaim the devise, it becomes inoperative and goes to the heir."

It is said that a parol disclaimer will not prevent the devisee from subsequently claiming the devise, and that the reason of the necessity of a deed grows out of the presumptive vesting of the devised interest in the devisee before entry: See Perry v. Hale, 44 N. H. 365. It is, in our opinion, illogical to say that a deed is necessary because of the presumption that the title has vested, when the title does not vest by a devise unless there is an acceptance. It would seem that the deed would be necessary only where the title had actually vested, which appears to depend upon acceptance. If it be admitted that the law will presume an acceptance, it is not a conclusive presumption, and, when it is shown to have been renounced, it is shown that the title did not vest, and apparently there would be no occasion for divesting a title that had not vested. There are two classes of cases in which it may become necessary to determine what constitutes a renunciation or acceptance: 1. Cases where the devisee or his privies are denying renunciation; and 2. Where they are asserting it. In the former (i. e., before the devisee can be deprived of the estate) there are cases that hold that renunciation is not to be lightly inferred, and that equivocal acts will not do, and it has been contended that a deed is necessary when the devise is of an absolute and unconditional <sup>422</sup> fee. On the other hand, if the devisee or his privies are asserting renunciation, or, what is equivalent, denying acceptance, it has been said that "the presumption of assent is never conclusive; neither are acts that indicate a design or intention to accept": Wheeler v. Lester, 1 Brad. 293; Perry v. Hale, 44 N. H. 365. But an entry and occupation under the will have been considered the most satisfactory evidence of acceptance, in cases where action has been



brought against the devisee, where the devise was subject to the payment of debts: *Pickering v. Pickering*, 6 N. H. 120; *Glen v. Fisher*, 6 Johns. Ch. 33; 10 Am. Dec. 310; *Kelsey v. Western*, 2 N. Y. 500. In this case the devisee is dead, and his grantee sets up the claim that he entered and occupied the premises under another title; i. e., a tax title acquired after the devise, but before the end of the preceding estate. There is no other evidence bearing upon the question of acceptance or renunciation, except the fact that he claimed title in fee, contrary to the terms of the devise, and we are asked to determine whether this was sufficient evidence of renunciation to go to the jury.

In *Doe v. Smyth*, 6 Barn. & C. 112, the court said that a devisee cannot be compelled to accept the devised interest, but may by some mode renounce and disclaim it. "And it is not necessary in the present case to decide whether such renunciation and disclaimer may be by parol, because, in whatever form they are made, we think they must be a clear and unequivocal disclaimer of any estate in the land. In this case the disclaimer is not of any estate in the land, but only of benefit under the will, accompanied in every instance with an assertion of a right to the land by a higher and better title. This proceeded on a mistake of which the devisee (the lessor of the plaintiff), though slowly and reluctantly, was at last convinced. No case similar to this was cited, or has been found, and we therefore think the lessor of the plaintiff is not precluded from acting under her improved judgment, and taking the land as devisee under the will."

<sup>423</sup> Here the devisee was denying renunciation, and her contention was sustained. Whatever we may think of the holding that a disclaimer of a devise is not good unless it goes to the extent of disclaiming any interest in the land, although such claim may be based upon other and better title, it must be conceded that the case turned upon that, or that, at all events, it did not decide that a disclaimer must be by deed. This case was decided in 1826.

The case of *Bryan v. Hyre*, 1 Rob. (Va.) 102, 39 Am. Dec. 246, decided in 1842, affirmed a case where the trial judge had instructed the jury that a disclaimer of a devise must be in writing. This is based upon the rule laid down in *Coke on Littleton*—that, where a devisee enters, the freehold is in him before he enters, and in that case the heir takes nothing: *Coke on Littleton*, 111a. The case of *Townson v. Tickell*, 3 Barn. & Ald. 31, was cited, but it does not decide the point, for there the disclaimer was in writing. The decision really rests upon *Doe v.*

Smyth, 6 Barn. & C. 112, which, as has been shown, did not pass upon the question. Indeed, that case (i. e., Doe v. Smyth) seems to have overlooked the earlier case of Townson v. Tickell, 3 Barn. & Ald. 31, decided in 1819. Bryan v. Hyre, 1 Rob. (Va.) 102, 39 Am. Dec. 246, mentions it to disapprove the opinion of Holroyd, J., where he says: "I think that an estate cannot be forced on a man. A devise, however, being prima facie for the devisee's benefit, he is supposed to assent to it, until he does some act to show his dissent. The law presumes that he will assent, until the contrary be proved. When the contrary, however, is proved, it shows that he never did assent to the devise, and consequently that the estate never was in him. I cannot think that it is necessary for a party to go through the form of disclaiming in a court of record, nor that he should be at the trouble or expense of executing a deed to show that he did not assent to the devise. Unless some strong authority were shown to that effect, I cannot think that the law requires either of those forms. I am confirmed in that opinion by the case of Bonifaut v. Greenfield, Cro. Eliz. 80."

<sup>424</sup> In that case the renunciation was by deed, and it was claimed that was insufficient, and that a disclaimer in a court of record was necessary. All of the judges agreed that the disclaimer by deed was good, and the dictum contained in the opinion of Holroyd, J., was apparently approved by the other justices. So far, then, we have dictum against dictum, in the English cases, with the Virginia case holding a writing necessary.

The question was up in Massachusetts in the same year that Doe v. Smyth, 6 Barn. & C. 112, was decided (i. e., 1826): Stebbins v. Lathrop, 4 Pick. 43. It was there held that nothing short of an express renunciation could be taken notice of by a court of probate. The court said: "Nothing appears amounting to a renunciation. But, if this were doubtful, the question is not to be settled in the court of probate. The respondent has a right to be heard on this point in a court of law, and he cannot be so heard if the grant of probate should be revoked. The most that appears at present is an intention to renounce, and even this is not very clear. It is possible that the intention was merely to impede the creditors in the collection of their debts. Until the legatees shall actually renounce their legacies, their assent to the provisions of the will, which are apparently beneficial to them, will be presumed: Townson v. Tickell, 3 Barn. & Ald. 31. If they should persist in the intention to renounce the estate, the probate of the will will not restrain them. And then the ques-

tion will be fairly raised whether this can be done to the prejudice of creditors. This being the light in which we view this point, it will not be necessary to determine whether the acts of the devisees will in law amount to a renunciation. It is sufficient to justify the proceedings of the judge of probate in this particular that these acts, taken together—especially the acts of Miner Stebbins—are equivocal, and that nothing short of an express renunciation can be taken notice of in a court of probate. And there seems no good reason why the fact should not be verified by the record, when the parties are present, and may renounce if they are so inclined. No doubt a devisee may disclaim by deed the estate devised, as was decided in the case of *Townson v. Tickell*, 3 Barn. & Ald. 31; and perhaps he may disclaim without being subjected to <sup>425</sup> the expense and trouble of executing a deed, as Holroyd, J., seemed to think. But it does not follow that a court of probate shall receive evidence of such disclaimer, and most certainly not when the evidence relates to acts of a doubtful bearing. In the case of *Proctor v. Atkyns*, 1 Mass. 321, it was decided that a court of probate could not determine upon a claim set up by deed, because it was determinable exclusively at the common law. The same reason applies with force to the supposed disclaimer in this case.

In *Webster v. Gilman*, 1 Story, 499, the following appears: "It may even be doubtful whether, under our laws, any renunciation or disclaimer not by deed or matter of record would be an extinguishment of the right of the devisee. But at all events it should be evidenced by some solemn act or acknowledgment in writing, or by some open and positive act of renunciation or disclaimer which will prevent all future cavil, and operate, in point of evidence, as a quasi estoppel." Here, again, the question was not decided.

The question was before the United States circuit court again in *Ex parte Fuller*, 2 Story, 330, and again it was not passed upon. The court said: "As to the other point, there is no doubt that the devisee must consent, otherwise the title does not vest in him. But where the estate is devised absolutely, and without any trust or encumbrances, the law will presume it to be accepted by the devisee, because it is for his benefit; and some solemn, notorious act is required to establish his renunciation or disclaimer of it. Until that is done, *stabit presumptio pro veritate*. That is sufficiently shown by the case of *Townson v. Tickell*, 3 Barn. & Ald. 31, cited at the bar, and the still later case of *Doe v. Smyth*, 6 Barn. & C. 112. *Brown v. Wood*, 17 Mass.



68, and *Ward v. Fuller*, 15 Pick. 185, manifestly proceeded upon the same foundation. Now, in the present case, there is no pretense to say that Ross has ever renounced or disclaimed the estate devised to him. The statement of fact is that he has done no act accepting or declining the devise. If so, then the presumption <sup>426</sup> of law is that he has, by implication, accepted it, since it gives him an unconditional fee."

The case of *Ward v. Fuller*, 15 Pick. 185, went no further than to hold that a devisee before entry had a sufficient seisin to maintain a writ of right.

In 4 Kent's Commentaries, page 533, it is said that: "An estate vests, under a devise, on the death of the testator, before entry. But a devisee is not bound to accept of a devise to him *nolens volens*, and he may renounce the gift, by which act the estate will descend to the heir, or pass in some other direction under the will. The disclaimer and renunciation must be by some unequivocal act, and it is left undecided whether a verbal disclaimer will be sufficient. A disclaimer by deed is sufficient; and some judges have held that it may be by a verbal renunciation. Perhaps the case will be governed by circumstances": See, also, *Perry v. Hale*, 44 N. H. 364.

From the foregoing, we conclude that an acceptance should be presumed in this case, which presumption may be overthrown by acts inconsistent with acceptance. The only evidence here is the purchase of tax titles, and procuring and recording tax deeds of the premises, and the conveyance, by full warranty deed, within two years after Betsey Casler's death, of the premises devised. The inference is strong that Henry Casler's design in obtaining the deeds was to acquire a better title than that conveyed by the will, either because of some inherent defect in the latter, or from a desire to obtain the fee. There is perhaps room for the suspicion that his mother, Betsey Casler, permitted this, as the plaintiff's counsel contends, or that Henry accomplished it without her knowledge, but in either case it tended to show a desire to obtain a better title than he then had. It does not necessarily follow that he was willing to disclaim a valid life estate for his chances under a tax title which, if invalid, might compel him to share his life estate with his brothers and sisters. Again, the testimony of the witness Beard that <sup>427</sup> he found the land advertised in the paper, and bid it in, tends to show that the sale was not the result of collusion or fraud, and that Henry Casler obtained the tax title from Beard to protect his mother as well as himself. This testimony should not have been stricken out

upon plaintiff's motion. If the son, Henry Casler, never accepted the devise, it is an end of the case upon this record, entitling the defendants to a verdict, inasmuch as the tax deeds are *prima facie* valid, and conveyed the fee.

But, if Henry Casler accepted the devise, it becomes necessary to inquire whether he can set up his tax deeds against the remaindermen. This is said to depend upon the question whether he owed a duty to them to pay the taxes, or preserve the estate for them, analogous to the duty which his mother owed to him and them. We have found no case upon all fours with this, and we doubt if it can be said that the law imposes any such duty upon the second life tenant, during the tenancy of his predecessor. But we think it does not necessarily turn upon a duty to pay. While he was under no obligation to preserve the estate, if he chose to do so that he might reap the benefit of the devise, he should be content to look to the occupant, whose duty it was to pay them, for reimbursement, or, if not, he could expect no more than contribution from the other remaindermen, to whose benefit, as well as his own, such payment inured. It would be inequitable to permit him to claim title under such circumstances, where he took under the same will that gave them an estate, thereby recognizing their right. Good faith toward the testator should forbid such an attempt to defeat his purpose. Were this claim to be sustained, it would make it easy for two life tenants, by collusion, to defeat the remaindermen, under circumstances like these. It may be said that this could be done by the mere disclaimer, but this is a mistake: See 2 How. Stats. sec. 5548.

<sup>428</sup> We are cited to *Blackwood v. Van Vliet*, 30 Mich. 118, and *Sands v. Davis*, 40 Mich. 14, to sustain the claim that Henry Casler was under no disability as a claimant of the fee under the tax deeds. The former was a case where one who went into possession before the tax levy was held not to be precluded from making and relying upon a purchase of land at tax sale. In *Sands v. Davis*, 40 Mich. 14, the question arose between tenants in common. In that case one bought a tax title that was outstanding at the time of the purchase of his interest in the premises, and therefore which he owed no duty, to the state or his cotenants, to pay, and it was held that he might set up such title against his cotenants. Both of these cases recognize the proposition that one asserting a tax title may be under a disability, owing to his relations to others claiming interests in the land. In *Blackwood v. Van Vliet*, 30 Mich. 118, it is said: "It

was not claimed in this case, so far as the record shows, that there were contract or other relations between Blackwood and Van Vliet that would preclude the latter from buying the former's land for delinquent taxes."

In *Sands v. Davis*, 40 Mich. 14, Campbell, C. J., uses the following language: "If Sands had gone into possession by the aid of the other tenants, or in recognition of their rights, he might in that way, perhaps, have incurred some duties toward them. But he went in as a stranger to their claims, under a claim which denied their existence or validity. He became liable to an action of ejectment the moment he assumed possession. We see, therefore, no reason why he could not then or thereafter, as well as he could have done it before, purchase a title which was at that time adverse to the holders of the whole original title. The case of *Blackwood v. Van Vliet*, 30 Mich. 118, holds, in conformity with these views, that there can be no estoppel against purchasing tax titles, except against one who had a duty to pay the tax or remove the burden."

420 There is abundant authority that a tenant in common, whose duty it is to pay a portion of the taxes, cannot acquire a title, as against his cotenant, by purchase at a tax sale for the entire tax: *Dubois v. Campau*, 24 Mich. 360, and notes.

In 1 Wood on Landlord and Tenant, section 54, it is said: "In the absence of any reservation of rent, or other provision in the lease or conveyance providing therefor, a tenant for life, as between himself and the reversioner, is bound to pay the taxes assessed upon the premises; and if he fails to do so, and they are sold therefor, and the tenant becomes the purchaser, he cannot claim a title in fee against the reversioner": See, also, *Cairns v. Chabert*, 3 Edw. Ch. 312; *Smith v. Blindbury*, 66 Mich. 323; *Patrick v. Sherwood*, 4 Blatchf. 112; *McMillan v. Robbins*, 5 Ohio, 28; *Pike v. Wassell*, 94 U. S. 711; *Sidenberg v. Ely*, 90 N. Y. 257; 43 Am. Rep. 163; *Varney v. Stevens*, 22 Me. 331; *Prettyman v. Walston*, 34 Ill. 175; *Hitner v. Ege*, 23 Pa. St. 305.

Some of these cases hold that where the life tenant is compelled to make permanent betterments, or to pay off encumbrances to prevent a forfeiture, he may enforce contribution against the remainderman, to the extent of his interest in the land: *Cairns v. Chabert*, 3 Edw. Ch. 312; *Foster v. Hiliard*, 1 Story, 77; *Davies v. Meyers*, 13 B. Mon. 512; *Bell v. Mayor*, 10 Paige, 49; *Eastabrook v. Hapgood*, 10 Mass. 313; *Atkins v. Kron*, 8 Ired. Eq. 1. Thus it appears that, while the life tenant in possession may be under no legal obligation to pay an encumbrance, and therefore



owes no duty to the remainderman, if, to prevent a forfeiture of his estate, he does pay it, he has a claim against the interest of the remainderman. Either party may buy in the encumbrance, but cannot hold it to the exclusion of the other, who is willing to contribute his share of the amount paid for the purchase: See cases cited, and Connecticut Mut. Life Ins. Co. v. Bulte, 45 Mich. 430 122; Whitney v. Salter, 36 Minn. 103; 1 Am. St. Rep. 656. In this case it was not clear that any portion of the encumbrance was chargeable to the life tenant, yet it was said that he should be regarded as having made the purchase for the joint benefit of himself and the reversioner or remainderman—citing 1 Washburn on Real Property, 96; Bisset on Estates for Life, 248 (42 Law Lib. 139); see, also, Cooley on Taxation, 2d ed., 500-509. We see no reason why this doctrine should not apply equally to the devisee of a life estate not in possession, and can see no difference in principle. And we think the rule as applicable to taxes as to any other encumbrance. Therefore we think the right to assert these deeds against the remaindermen hinges on the acceptance or renunciation by Henry Casler of the devise.

Counsel for defendants attack plaintiff's title, claiming that the quitclaim deeds given by the heirs of Henry Casler before his death conveyed no interest, for the reason that there "are no heirs to the living." But the statute is a sufficient answer. The remainder was a future estate, which the statute (2 How. Stats. sec. 5551) declares to be descendible, devisable, and alienable in the same manner as estates in possession.

Counsel also contend that the devise is void under section 5531 of 2 Howell's Statutes, which reads as follows: "The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of two lives in being at the creation of the estate except in the single case mentioned in the next section."

We think that statute has no application, for the power of alienation was suspended for the period of two lives in being only, viz., Betsey Casler and Henry Casler: See, also, 2 How. Stats. sec. 5535.

Plaintiff's title is also attacked upon the ground of want of jurisdiction in the probate court to admit the will to probate, but we think this question is foreclosed by the stipulation that said will was duly probated, etc.

There is a further question in the case which is discussed 431 by counsel for the defendants. There is nothing to show that the will was ever recorded, while the tax deeds were promptly placed

upon record. The latter fact has significance upon the subject of renunciation, because, if Henry Casler was claiming under the will, there was no occasion for his recording such deeds. Again, the defendants are not shown to have had any actual or constructive notice of the will, or the rights of any of the parties under it. He was therefore apparently a bona fide purchaser, relying upon the record of the tax deeds, which was the only title appearing of record in Henry Casler.

As foreshadowed, our conclusion is that it was a question for the jury to determine whether Henry Casler accepted or renounced the devise, and that it was error to direct a verdict for the plaintiff.

The judgment will be reversed, and a new trial ordered.

Long, C. J., Grant and Moore, JJ., concurred.

Montgomery, J., concurred in the result.

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**ESTATES—WHAT WORDS CREATE LIFE ESTATE.**—A devise to G and to his children, the heirs of his body, does not vest in G anything beyond a life estate, though the testator in another clause speaks "of the land I have devised to G": *Mefford v. Dougherty*, 89 Ky. 58; 25 Am. St. Rep. 521. See *Fletcher v. Tyler*, 92 Ky. 145; 36 Am. St. Rep. 584, and note; *Jordan v. Neece*, 36 S. C. 295; 31 Am. St. Rep. 869.

**WILLS—CONSTRUCTION OF—EVIDENCE—DECLARATIONS OF TESTATOR.**—The declarations of the testator are incompetent as evidence to add to, explain, or in any manner control the construction of a will: *Magee v. McNeil*, 41 Miss. 17; 90 Am. Dec. 354, and note; *Couch v. Eastham*, 27 W. Va. 796; 55 Am. Rep. 346. The testator's meaning of ambiguous words in the will cannot be shown by the testimony of the one who drew the will: *McAllister v. Tate*, 11 Rich. 509; 73 Am. Dec. 119, and note.

**ESTATES—PAYMENT OF TAXES—RIGHTS OF LIFE TENANT AND REMAINDERMAN.**—A tenant for life of real estate is compelled to pay taxes and expenses of repairs out of the rents and profits, unless he voluntarily pays them out of other funds: *St. Paul Trust Co. v. Mintzer*, 65 Minn. 124; 60 Am. St. Rep. 444. A tenant for life cannot acquire the title of the remainderman by purchase at a tax sale: *Stewart v. Matheny*, 66 Miss. 21; 14 Am. St. Rep. 538, and note. The purchase of an encumbrance upon, or of an adverse title to, an estate by the tenant for life in possession, will be regarded as having been made for the joint benefit of himself and the reversioner or remainderman: *Whitney v. Salter*, 36 Minn. 103; 1 Am. St. Rep. 656. See *Cockrill v. Hutchinson*, 135 Mo. 67; 58 Am. St. Rep. 564, and note.

**DEVISES—PRESUMPTION AS TO ASSENT THERETO.**—A beneficiary's assent to a trust created for his benefit will be presumed in absence of evidence to the contrary: *Stockard v. Stockard*, 7 Humph. 303; 46 Am. Dec. 79, and note. The disclaimer by the devisee of a freehold estate, to be of any effect in concluding him must be in writing: *Bryan v. Hyre*, 1 Rob. (Va.) 94; 39 Am. Dec. 246.

## FIRST NATIONAL BANK OF ATHENS v. GARLAND.

[109 MICHIGAN, 515.]

**JUDGMENTS, FORM OF.**—A judgment against "said defendants," the title of the case being stated, is sufficient. An obscure judgment entry may be construed with reference to the pleadings and record.

**JUDGMENTS.**—A WARRANT OF ATTORNEY purporting to give authority to confess judgments in courts beyond, as well as within the limits, of the state where it is executed, is not void. It confers authority to confess judgment in that state, whatever be its effect elsewhere.

**JUDGMENT BY CONFESSION.**—A statute providing that judgment shall be entered only upon the filing of a verified complaint, and the issuing of summons, does not apply to a case where a warrant of attorney is given expressly permitting judgment without process.

Van Kleeck & Anneke, for the appellant.

Simonson, Gillett & Courtright (C. L. Collins, of counsel), for the appellee, Garland.

516 **HOOKE**, J. This action was brought upon a judgment, rendered in favor of the plaintiff and against the defendants in the common pleas court for the county of Athens, in the state of Ohio, by confession of attorney, upon a note reading as follows: "\$5,000. Chillicothe, O., May 29, 1894.

"Four months after date, we jointly and severally promise to pay to the order of George F. Hunter five thousand dollars, for value received, with interest at the rate of eight per cent per annum after maturity. And we hereby jointly and severally authorize and empower any attorney at law, in any court of record, at any time after the above note becomes due, to appear for us, or either of us, without process, in court, and confess judgment for the said amount, interest, and costs, in favor of the payee, legal holder, indorsee, or assignee hereof, and release all errors which may accrue in the rendition of such judgment.

"And we also release the right of appeal, the stay of execution, and the power and privilege to hold exempt from execution any personal or real property belonging to us, or either of us, at and after the date of such judgment; and our said attorney is hereby authorized to enter such release in such judgment.

National Cotton Seed Oil & Huller Co.,

"Per G. W. Washburn, Pt.,

"John D. Milburn.

John W. Barger, Secy.

"T. H. Milburn.

John W. Washburn,

"G. W. Washburn.

M. Garland.

"R. T. Hough.

A. J. Deiterich.

"John W. Corwin.



"Demand, notice, and protest waived."

Indorsement:

"George F. Hunter."

A verdict was directed in behalf of the defendants, and the plaintiff has appealed.

<sup>517</sup> In the circuit court the case turned upon the failure of the judgment entry to include the names of the several defendants, they being designated as "said defendants" by reference to the title of the cause. It is a general rule that an obscure judgment entry may be construed with reference to the pleadings and record: *Foot v. Glover*, 4 Blackf. 313; *Fowler v. Doyle*, 16 Iowa, 534; *Bell v. Massey*, 14 La. Ann. 843. In *New Orleans etc. Ry. Co. v. New Orleans*, 14 Fed. Rep. 373, it was held that a judgment might be construed in the light of the opinion rendered. Numerous cases hold that a judgment for or against plaintiffs or defendants generally, the names being omitted, may be explained by a reference to the caption, record, or pleadings: *McCartey v. Kittrell*, 55 Miss. 253; *Smith v. Chenault*, 48 Tex. 455; *Collins v. Hyslop*, 11 Ala. 508; *Finnagan v. Manchester*, 12 Iowa, 521; *Rood v. School Dist.*, 1 Doug. (Mich.) 502; *Overall v. Pero*, 7 Mich. 315.

Counsel for defendants claim that the Ohio judgment was void, and that the direction of the circuit judge was correct for that reason. As grounds for this it is asserted: 1. That the warrant of attorney was void, because too comprehensive, in that it attempted to confer the power to confess judgment upon any attorney in any court in the world; 2. That no valid judgment could be rendered in Ohio without process being issued.

We are cited to two cases in support of the first contention, viz: *Carlin v. Taylor*, 7 Lea (Tenn.), 667; *Davis v. Packer*, 8 Ohio Cir. Ct. Rep. 107. In the former of these, an action was brought in term upon a judgment by confession, rendered in Ohio, upon a warrant of attorney executed in Pennsylvania. This warrant empowered an attorney of record, "within the United States or elsewhere," to confess judgment, and it was said to be "void for its comprehensive uncertainty." This was going further <sup>518</sup> than the necessities of the occasion required, and the language quoted was qualified by the following: "As we have seen, the note and power of attorney was made in Pennsylvania. Giving to the law of that state its fullest operation, and conceding that, under it, the power to confess judgment might have been exercised within the lines of the state, that power will certainly not be extended to any state in which the holder may see fit to carry or transmit the paper, and have it there construed as con-

structive and effective notice of proceedings for its enforcement by recovery of judgment for the amount stipulated in its terms to be paid. Otherwise, one state might, by its legislation, affect all the citizens of other states equally with its own, and require of these other states the application of its statutory laws to citizens of such other states, and who could not be brought within the jurisdiction of its courts. Such recognition would confer upon one state the power to prescribe rules of practice for all others. The Ohio court seems to have recognized such right, but, as we think, without authority of law, and without such purpose on the part of Pennsylvania."

The Ohio case was one where the instrument was made in Chicago, and made payable there. An appeal was taken from a judgment entered in Ohio, and the question was whether the instrument authorized it. Like the instrument in the Tennessee case, the warrant contained no limitation as to where the judgment might be taken, the language being, "in any court of record." The court said: "It seems to us as bordering on the absurd to suppose that the parties to these instruments intended that judgments might be rendered on them in any court of the United States or any court in the world. The note is made payable at a particular place in the city of Chicago, in the state of Illinois. It would seem strange that, after providing particularly as to place of payment, they had provided that judgment might be taken in any court of the world."

Not only did the court not follow the suggestion of the court of Tennessee, that the provision was void, but it <sup>519</sup> quoted with approval the following language of Mr. Freeman, viz.: "Mr. Freeman, in his work on Judgments, says, at section 545: 'While a warrant of attorney may doubtless be so drawn as to authorize a confession in another state, yet the intention to give authority to act beyond the state is not presumed; and, though some of the words used are sufficiently comprehensive to justify the attorney in acting in any state or country, yet, if there are words which appear to limit the authority to the state in which the warrant was executed, they will prevail.'"

It was held that the Ohio common pleas had no jurisdiction of the case. In our opinion, it is unnecessary to go the length of holding warrants of attorney void because they purport to give authority to confess judgments in courts beyond the limit of the state where the instrument is executed. The authorities upon the subject are not all in accord with the case cited, and we see no reason why such instruments could not be held valid

as to judgments confessed within the state where the warrant was executed: See *Teel v. Yost*, 128 N. Y. 387; 13 L. R. A. 796, and notes. In the case before us, the instrument purports to have been executed within the state of Ohio, and, though counsel for the defendants state that one of the makers executed it in Michigan, we are not advised that the record shows it. The judgment was rendered by a court of record of that state, within the terms of the warrant, upon confession of an attorney of that court, as appears by the judgment. The case, therefore, is not one presenting the question actually decided in either of the cases mentioned, and, in our opinion, the warrant of attorney was such as to confer necessary jurisdiction.

We think there is no merit in the other point. It is urged that the Ohio statute (secs. 5035, 5060) precludes a judgment except upon the filing of a verified petition and issue of summons. We are of the opinion that these sections should not apply to a case where <sup>520</sup> the warrant expressly permits judgment without process, as in this case. Section 5321 et seq. authorizes judgments by confession. A petition duly verified was filed, as the record shows.

The Ohio judgment being valid, the judgment is reversed, and a new trial ordered.

Grant, Montgomery, and Moore, JJ., concurred.

Long, C. J., did not sit.

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**JUDGMENT—ENTRY—FORM OF.**—A final judgment must show intrinsically and distinctly, and not inferentially, that the matters in the record have been determined in favor of one of the litigants, or that the rights of the parties have been adjudicated: *Scott v. Burton*, 6 Tex. 322; 55 Am. Dec. 782. Where a judgment is not entered in full but in a short form, with reference to another entry in full and proper form, no execution can be issued thereon: *Tombeckbee Bank v. Strong*, 1 Stew. & P. 187; 21 Am. Dec. 657. It must appear what the judgment was: *Rape v. Heaton*, 9 Wis. 328; 76 Am. Dec. 269. See *Bowen v. Wickersham*, 124 Ind. 404; 19 Am. St. Rep. 106; *Carlisle v. Killebrew*, 91 Ala. 351; 24 Am. St. Rep. 915.

**JUDGMENT BY CONFESSION.**—A judgment by confession is valid without previous process: *Farley v. Lea*, 4 Dev. & B. 169; 32 Am. Dec. 680.

**JUDGMENT BY CONFESSION—WARRANT OF ATTORNEY.** Warrants of attorney to confess judgment should be strictly construed: *Little v. Dyer*, 138 Ill. 272; 32 Am. St. Rep. 140, and note; *Estate of Claghorn*, 181 Pa. St. 600; 59 Am. St. Rep. 680, and note. See extended note to *Lee v. Figg*, 99 Am. Dec. 275.



## DAMM v. DAMM.

[109 MICHIGAN, 619.]

**LIFE TENANT AND REMAINDERMAN — ENCUMBRANCE.**—As between a life tenant in possession and the remainderman, the former is bound to pay the interest and the latter the principal of any encumbrance to which the estate of both is subject.

**LIFE TENANT IN EXPECTANCY AND REMAINDERMAN — ENCUMBRANCE.**—If an encumbrance exists to which the interest of a life tenant in expectancy, and also that of the remainderman, is subject, but which does not affect the life tenant in possession, and such encumbrance is discharged by the remainderman, the life tenant in expectancy is liable to contribute his proportion of the amount so paid, to be computed on the basis of the relative value of the estates. In making this computation the owner of the expectant life estate should be charged his share of the interest according to his expectancy up to the time when his estate becomes one in possession, and all the interest which will accrue after that time, and during the continuance of his estate, but in estimating such interest, consideration must be given the fact that it is to accrue and become payable at a future time. The expectancy of the life of the parties is involved, and that is to be determined from evidence of their age, health, and habits, aided by life tables.

**EVIDENCE.**—**LIFE TABLES ARE NOT CONCLUSIVE** evidence of the expectancy of life of any given person, but are considered in the light of, and subject to, variation by proof concerning, the health and habits of the person whose expectancy is in question.

Brooke & Spalding, for the complainant.

James H. Pound, for the appellant.

**620** **HOOVER, J.** Mary A. Damm, aged sixty-nine years, was the owner of an unencumbered life estate in certain premises. She was also owner of the fee of said premises, subject to a life estate in Amelia Damm, aged forty-three years, which in turn was subject to a mortgage, to which mortgage Mary Damm's interest in fee was also subject. Mary Damm was in possession, and purchased the mortgage; thereby paying it, to the extent of her liability thereon, as we held when the case was before us: *Damm v. Damm*, 91 Mich. 424. The question now before us is, What share is chargeable upon the expectant life estate of Amelia Damm?

It is contended by counsel for the defendant Amelia Damm that her liability is limited to the payment of the interest, and that the principal is chargeable upon the remainder in fee, as between her and the owner in fee, who is Mary Damm. On the other hand, it is claimed that the mortgage was in existence when both of the estates were created, and that both are estates in expectancy; that the estate in possession is liable for neither; and that the two estates in expectancy should share, in proportion to their respective values, the burden of the mort-

gage, principal and interest. It is conceded in the brief of counsel for the complainant that "the rule is uniformly laid down that, as between a life tenant in possession and a remainderman, the life tenant is bound to pay the interest, and the remainderman the principal": Citing *Cogswell v. Cogswell*, 2 Edw. Ch. 231; 4 Kent's Commentaries, marg. p. 74; 1 Washburn on Real Property, 129, and note, and 319 (marg. pp. 96, 257). And they cite us to authorities holding that the obligation upon the life tenant includes arrearages of interest. It is urged, however, that this obligation is not limited to interest, where the life estate is in expectancy, though no authority is cited in support of this contention; and we think there is little reason for a distinction between estates for life in possession, and those in expectancy, if, as counsel contend, the latter is obliged to protect the remainderman in fee against arrearages of interest due from, but not paid by, <sup>621</sup>his predecessor. It would seem that he should be satisfied with protection against the interest. Kent calls this a hard rule, though he says it was laid down in *Penrhyn v. Hughes*, 5 Ves. 99, cited by counsel: See 4 Kent's Commentaries, 75. The rule is doubted in *Sharshaw v. Gibbs, Kay*, 339, where it was said to have been unnecessary to lay down so wide a rule. And in *Caulfield v. Maguire*, 2 Jones & L. 141, 160, Lord St. Leonards questions the rule, and the case of *Tracy v. Hereford*, 2 Brown Ch. 128, which the case of *Penrhyn v. Hughes*, 5 Ves. 99, professes to follow, saying: "I am not prepared to fix the defaults of every previous tenant for life on the last taker for life. It is as incumbent on the reversioner in fee to look after the tenant for life in possession as it is on a tenant for life in remainder."

This language means much. It substantially says that the owner of a life estate in expectancy does not owe the duty to the reversioner of preserving the estate, until he acquires possession; that such duty rests upon the first life tenant; and that his estate is liable for the performance of such duty, which the reversioner may enforce, if he cares to do so (as can the second life tenant), but he cannot require the latter to do so, or to make good the default, if he himself does not choose to enforce his rights. Furthermore, this seems to imply that the life tenant in expectancy owes no duty of paying the principal, or a proportionate part of it, for, if it were otherwise, he would certainly be liable for at least a proportionate share of such arrearage.

The first life tenant was under no obligation to pay the in-

terest during her tenancy. That was a charge upon the estates to follow. Neither party has immediate income from her estate, and therefore the profits from the land cannot be applied to such payment. Yet the interest must be paid, to protect the expectant estates, and this we think a matter of mutual concern to the owners thereof. We hold, herefore, that Amelia Damm <sup>622</sup> should contribute to Mary Damm, who paid it, a proportionate share of such interest, to be computed upon the basis of the relative values of the estates: See *Defreese v. Lake*, 109 Mich. 415, ante, p. 584.

It therefore becomes necessary to ascertain what share of this interest is equitably due from Amelia Damm, for the amount thereof is the sum for which the complainant should be entitled to a decree against the life estate of Amelia Damm. Of the interest to the date of the commencement of the life estate of Amelia Damm, she should pay her share according to her expectancy, and the owner of the remainder should pay the rest. To this should be added an amount equal to the present value of the encumbrance on Amelia Damm's estate, viz., the interest which would be payable annually on five hundred dollars during the period of her life estate: *Hodges v. Phinney*, 106 Mich. 537; 1 *Scribner on Dower*, 537, and cases cited; *House v. House*, 10 Paige, 153; *Atkins v. Kron*, 8 Ired. Eq. 4. The interest which may be expected to accrue during the life estate of Mary Damm, and that which will follow, cannot be computed upon the same basis, because Amelia Damm should pay all of the latter, and but a proportionate part of the former. To ascertain the former, the proportion that her life estate bears to that of the remainderman is the proportion of the interest she should pay. As to the latter, her expectation of life must be ascertained, to determine the aggregate amount of interest that she must provide for. When that is ascertained, the present value can be determined by a computation, in which the fact that it is to be paid immediately, instead of at the commencement of her term, should be considered. In both these questions the expectancy of life of both parties is involved. Expectancy of life is a question of fact, and while life tables are very convenient aids, and perhaps afford the most satisfactory basis of an estimate, they are not conclusive, being considered in the light of, and subject to variation by proof concerning, the age, health, and habits of the parties.

<sup>623</sup> The decree entered must be reversed, and the case remanded to the circuit court in chancery, with directions to re-



fer the case to a master to take proofs, and compute and report to said court the amount equitably due upon said mortgage from said Amelia Damm, under the rule laid down herein, or that said court, if it be deemed advisable, take such proof and make such computation, and that, upon such report or computation, a decree of foreclosure be entered in favor of the complainant for such sum. The defendant will recover costs of this court.

Grant, Montgomery, and Moore, JJ., concurred.

Long, C. J., did not sit.

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**ESTATES—LIFE TENANT AND REMAINDERMAN—RIGHTS AS TO ENCUMBRANCES.**—If the property is subject to an encumbrance which is paramount to the estate both of the tenant in possession and the remainderman, the former must pay the interest thereon, but need not pay off the principal either in whole or part. If the encumbrance be one which the latter is forced to discharge he is entitled to contribution from the life tenant. The amount of this contribution may be ascertained by estimating what would be the value of an annuity equivalent to the amount of the interest which the life tenant is relieved from paying; and in making this determination, his age and health will be considered as indicating his probable expectancy of life: *Monographic note to Allen v. De Groodt*, 14 Am. St. Rep. 634; *Swaine v. Perine*, 5 Johns Oh. 482; 9 Am. Dec. 318. See *Smith v. Barham*, 2 Dev. Eq. 420; 25 Am. Dec. 721.

**EVIDENCE—MORTALITY TABLES—HOW FAR CONCLUSIVE.**—Standard life tables are often admissible in evidence as showing one's probable expectancy of life, but taken as proof they are subject to the conditions surrounding the individual investigation: *Greer v. Louisville etc. R. R. Co.*, 94 Ky. 169; 42 Am. St. Rep. 345. Their value as evidence will depend upon such matters as the state of health of the given person, his habits of life, his social surroundings, and other circumstances, and the attention of juries should be pointedly called to those qualifying circumstances: *Steinbrunner v. Pittsburgh etc. Ry. Co.*, 146 Pa. St. 504; 28 Am. St. Rep. 806, and note; note to *Adams v. Iron Cliffs Co.*, 18 Am. St. Rep. 458.

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## TALBOT PAVING COMPANY v. CITY OF DETROIT.

[109 MICHIGAN, 657.]

**PUBLIC CONTRACTS—LOWEST BIDDER, RIGHT OF TO RECOVER FOR REFUSAL TO AWARD HIM THE CONTRACT.** The lowest bidder under a contract proposed to be let by a municipal corporation whose bid is wrongfully rejected cannot, in an action at law, recover the profits which he might have made had such bid been accepted. Statutory requirements requiring contracts to be let to the lowest bidder are not intended for his protection, but that of the public, and hence he has no remedy to recover damages sustained by their violation.

Brennan, Donnelly & Van De Mark (Atkinson & Wolcott, of counsel), for the appellant.

John J. Speed, for the appellee.

<sup>657</sup> LONG, C. J. By a resolution adopted May 5, 1891, the common council of the city of Detroit directed the board of public works of said city to advertise for proposals to pave Griswold street, from Jefferson avenue to Grand River avenue, with brick. Pursuant to such direction, the board advertised for bids for the paving of such street, according to the specifications adopted by the common <sup>658</sup> council and estimates by the city engineer. A bid was put in by the plaintiff company for twenty-six thousand four hundred and ninety-eight dollars and eleven cents, the next higher bid being that of John A. Stewart, for twenty-six thousand five hundred and twenty-eight dollars and sixteen cents. The plaintiff furnished the bidding and contract bonds required by law, and the board of public works thereupon executed a contract with the plaintiff in due form, approved in writing by the city counselor. All the bids and the contract were then referred to the common council, with the request for confirmation of the contract made with the plaintiff. The council referred the matter to one of its committees, which committee subsequently decided that the bid of plaintiff was the lowest, that it was responsible, and that adequate security had been given, but reported further to the council that the bid was informal, without stating what the informality was, and thereupon recommended that John A. Stewart's bid be accepted. The common council then accepted the report of its committee. In pursuance of the direction of the common council, the board of public works, against the protest of the plaintiff, entered into a contract with Stewart to do the paving. Before the making of this contract, the plaintiff notified the council of its claim to the contract, but without avail. The plaintiff then filed a petition in this court for a mandamus to compel the council to confirm its bid. The defendant answered, raised an issue of fact, which issue was sent to the Wayne circuit court for trial, and was finally settled in favor of plaintiff's contention. In the meantime Stewart had paved the street, and had been paid from the general paving fund. On that account solely, this court refused the writ of mandamus: Talbot Paving Co. v. Common Council, 91 Mich. 262. The plaintiff then brought this action against the city of Detroit to recover damages sustained by reason of the refusal of the council to let the contract to it, the plaintiff having first presented a verified claim to the council for its damages resulting from such action. On the trial in the court below.

verdict and judgment were <sup>659</sup> directed in favor of the defendant, and plaintiff brings error.

The facts are all admitted. The contention of the city here is that, while the contract to Stewart may have been void by reason of his not being the lowest bidder, yet no case can be found holding the lowest bidder, whose bid has been rejected, to have a right to an action at law to recover his profits; that, whenever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit, but that, where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party by its performance is merely incidental, and no part of the design of the statute, no such right is created as forms the subject of an action; that the plaintiff did not suffer any injury directly by the act of the council; that, though it may have lost profits which it might have made, yet such damages are consequential, and it is no part of the object of the statute to prevent losses of that kind. It is further contended by the city that, if the plaintiff had a right of action, it should have proceeded by injunction to prevent the doing of the work under the Stewart contract, or enforced its own right to the contract; that it could not lie by, and, after the work had been done and paid for, ask for profits which it might have made if it had been permitted to perform its contract. On the other hand, it is contended by counsel for the plaintiff that, had the common council refused to accept any of the bids, the city would have been liable, but, instead of refusing to accept any and all bids, it rejected the lowest bid, without any reason or cause whatever, and accepted a higher bid; and such being the case, the lowest bidder having suffered damages, the city is liable for the damages sustained.

It was settled in the mandamus proceeding (Talbot Paving Co. v. Common Council, 91 Mich. 262) that the objection made by the respondent was <sup>660</sup> purely technical and without foundation, and that justly, if not legally, the plaintiff may have been entitled to have its contract approved, as the respondent had made no change in the plans or specifications of the work, and was proceeding to make a contract under its original resolution; but as the contract had been already let, and the work done, no relief could be granted by the writ of mandamus. The question was left open whether, under the circumstances shown, the relator had a right of action for its damages. The proposi-



tion here is whether the lowest bidder, under a contract proposed to be let by a municipal corporation, whose bid has been rejected, has a right of action at law to recover profits which he might have made had his bid been accepted.

While it is true that there are many cases in which an injunction has been ordered because of the rejection of the lowest bid, and acceptance of a higher bid, under the same notice of letting the contract (*Times Pub. Co. v. Everett*, 9 Wash. 518; 43 Am. St. Rep. 865, and cases there cited), yet we find no cases, except as referred to hereafter, where a party has been permitted, under such circumstances, to bring and maintain an action at law for loss of profits. There are also cases which hold that the local assessment is void if the contract is not awarded to the lowest bidder: *Twiss v. Port Huron*, 63 Mich. 528. While, under the charter of Detroit, it was the duty of the city to let the contract to the lowest responsible bidder, yet this charter provision was not passed for the benefit of the bidder, but as a protection to the public. We think the rule as stated in *Strong v. Campbell*, 11 Barb. 138, is the true one, and the one which has always been adhered to by the courts. It is there stated as follows: "Whenever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting, by its performance, is merely incidental, and no part of the design of the statute, no such right is created as forms the subject of an action."

The learned judge writing the opinion in that case cites, in support of this rule, the cases of *Bank v. Mott*, 17 Wend. 556; *Martin v. Mayor*, 1 Hill, 545; 19 Vin. Abr. 518; *Ashby v. White*, 1 Salk. 19, 6 Mod. 51.

The court, in *Strong v. Campbell*, 11 Barb. 138, said: "It is unquestionably the duty of every officer to perform every duty imposed upon him by law in the manner and to the extent prescribed, and he may be punished for every violation to the injury of the public or that of individuals. But it does not follow that some one has a right of action against him for every neglect or violation of duty, to recover private damages."

Mr. Justice Selden, in the case of *Hickok v. Trustees*, 16 N. Y. 161, note, filed an opinion written by him in the case of *Weet v. Trustees*, which was adopted by the court as decisive of the

Plattsburg case. The learned justice reviews at great length the various cases, both English and American, upon the subject. He says: "We see, from the two classes of cases, that there is an important distinction between the obligations assumed by private individuals for a consideration received from the government or sovereign power of the state, and those assumed by public officers. . . . The reason for the distinction appears to be that intimated by Gould, J., in *Lane v. Cotton*, 1 Ld. Raym. 646, viz., that the duties in the one case are imposed upon the officer for public purposes only, while in the other they are voluntarily assumed with a view to private advantage. The cases which have been cited show that, in respect to this distinction, corporations have been placed upon the same footing as private individuals."

Continuing, Mr. Justice Selden says that he has been able to find only one case in this country or in England <sup>602</sup> opposed to those views, and that is the case of *Adsit v. Brady*, 4 Hill, 630; 40 Am. Dec. 305.

In view of this rule, What is the position of the city of Detroit toward the plaintiff? It owed no duty to the plaintiff. The charter provision which required the acceptance of the lowest responsible bid had no reference to any interest which the bidders might have in the premises, but was passed to protect the interest of the citizens of the city. Though the act accepting the second bid may have been against the interest of the citizens, certainly the plaintiff could have no action to redress that wrong and injury. It may have been, and evidently was, under the facts shown, a neglect of duty, and the plaintiff undoubtedly was injured by it. The case of *Adsit v. Brady*, 4 Hill, 630, 40 Am. Dec. 305, was decided upon the theory that, when a public officer acts or omits to act, contrary to his duty, the law gives redress to the injured party by an action adapted to the nature of his case. But, as we have seen, that rule is not sustained, except in cases where the act performed or omitted to be performed was with a view to some private advantage.

But, it is contended, this rule would be a great burden upon the public, and lead to great frauds in municipal affairs. It may be said in answer to this proposition: 1. That the public are not here complaining; and 2. That the plaintiff is not in a position to take advantage of the act, as the charter was not adopted for its individual benefit. Again, it is apparent that, if frauds may be perpetrated in that way, there is a remedy

by injunction to prevent the making of a contract with the next higher bidder.

We are of the opinion that the plaintiff cannot sustain this action. The judgment of the court below, therefore, is affirmed.

The other justices concurred.

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**MUNICIPAL CORPORATIONS—DUTIES AS TO LETTING OF CONTRACT TO LOWEST BIDDER.**—In the letting of contracts for public works or improvements, it is not the interest of the bidder which is to be guarded. The prime object of consideration is the welfare of the public. The lowest bidder in amount has sometimes sought recourse in an action for damages caused by the rejection of his bid, and the award of the contract to another, but such actions are generally held not to be maintainable: **Monographic note to State v. Rickards, 50 Am. St. Rep. 490, 495.**

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**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MONTANA.**

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**McNAUGHTON COMPANY v. MCGIRL.**

[20 MONTANA, 124.]

**INTERSTATE COMMERCE CARRIED ON BY CORPORATIONS** is entitled to the same protection which is given to such commerce when carried on by individuals.

**INTERSTATE COMMERCE.—IF A FOREIGN CORPORATION** is engaged in a business which is strictly interstate commerce, no law of a state can control or restrict such commerce by exacting conditions for permitting the corporation to do such business within the state.

**INTERSTATE COMMERCE—STATE TAXATION OF.**—Every tax on interstate commerce is a burden thereon, and, if imposed by the legislature of a state, is illegal.

**INTERSTATE COMMERCE—FOREIGN CORPORATIONS.** The purchase of wool by an agent of a foreign corporation in one state, for transportation to another state wherein the corporation does its business, is a transaction directly pertaining to interstate commerce, which such corporation is entitled to engage in, without complying with a statute of the former state exacting conditions for the right to do business therein.

G. A. Lane, for the appellant.

O. F. Goddard, for the respondent.

**126 HUNT, J.** The plaintiff, a corporation of New Jersey, doing business in that state, and in the states of New York and Massachusetts, as wool commission merchant, sent an agent into Montana to solicit consignments of wool to its eastern houses, there to be sold on commission by plaintiff for the benefit of certain consignors, woolgrowers of the state of Montana. It had various transactions of this nature with woolgrowers in Montana. In the particular case before us the exact terms of the agreement between the plaintiff and the defendant gave rise

to this litigation, but the facts were undisputed that plaintiff advanced a large sum of money to defendant upon his wool, and that the defendant's wool was consigned to plaintiff at New York, to be sold there by plaintiff, who was to credit defendant with the amount of the sale. The <sup>127</sup> real contention between the parties was whether the shipment so made was subject to a drawback by plaintiff against defendant if the wool did not net a sufficient sum in New York to cover plaintiff's advances to defendant, including interest, costs, etc., or whether the burden of any loss that there might be was to fall entirely on plaintiff.

The defendant availed himself of several defenses, including the one upon which the court directed a finding in his favor, namely, that the contract sued on was void as to the corporation, and could not be enforced in favor of the corporation.

By an act of the legislative assembly of the state of Montana approved March 8, 1893, every foreign corporation, before it commenced to do business in Montana, was required to file a certificate with the secretary of state, designating an agent, who must be a citizen of Montana, upon whom service of process might be had, and also stating the principal place of business of such corporation in this state. It was also provided by section 2 of said act that, if any foreign corporation failed to comply with the provisions of the law, all its contracts made and entered into with citizens of this state should be void as to the corporation, and that no court of this state should enforce the same in favor of the corporation. Inasmuch as plaintiff did not comply with the statute just cited, the important question raised is whether or not, if the plaintiff's facts alleged in its complaint are true, and the defendant does in reality owe to plaintiff the amount sued for as a drawback, plaintiff can recover on its contract.

It has been repeatedly laid down by the supreme court of the United States that interstate commerce carried on by corporations is entitled to the same protection against the exactions of a state which is given to such commerce when carried on by individuals. We are aware that the construction put upon section 2, article 4, of the constitution of the United States, which provides that the citizens of each state shall be entitled to all privileges and immunities of the citizens of the several states, has been generally uniform, to the effect that the language of that clause relates only to natural persons, <sup>128</sup> and not to artificial bodies, as corporations, and that the privileges and immunities guaranteed by the language referred to mean those of

the general nature granted to a state's own citizens, and not those special privileges conferred upon corporate bodies: *Lafayette Ins. Co. v. French*, 18 How. 404; *Bank of Augusta v. Earle*, 13 Pet. 519; *Ducat v. Chicago*, 10 Wall. 410; *Paul v. Virginia*, 8 Wall. 168; *Philadelphia etc. S. S. Co. v. Pennsylvania*, 122 U. S. 326. But, in the carrying on of interstate commerce, corporations are guaranteed the same rights and are entitled to the same protection as individuals. The supreme court, in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 204, expressly held that it did not make any difference whether such commerce is carried on by individuals or by corporations.

Justice Bradley, sitting on the circuit bench in the case of *Stockton v. Baltimore etc. R. R. Co.*, 32 Fed. Rep. 9, used the following language: "And, in carrying on foreign and interstate commerce, corporations, equally with individuals, are within the protection of the commercial power of Congress, and cannot be molested in another state by state burdens or impediments. This was held and decided in the case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 204, and affirmed in the recent case of *Philadelphia etc. S. S. Co. v. Pennsylvania*, 122 U. S. 326; and although the decision in *Paul v. Virginia*, 8 Wall. 168, conformed to the doctrine of *Bank of Augusta v. Earle*, 13 Pet. 519, the following striking language was used by the court, to wit: 'At the time of the formation of the constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson Bay Company, the Hamburg Company, the Levant Company, and the Virginia Company may be named among the many corporations then in existence which acquired, from the extent of their operations, celebrity throughout the commercial world. This state of facts forbids the supposition that it was intended, in the grant of power to Congress, to exclude from its control the commerce of corporations. 120 The language of the grant makes no reference to the instrumentality by which commerce may be carried on. It is general, and includes alike commerce by individuals, partnerships, associations, and corporations.' We may fairly supplement this language by adding that, when the constitution was adopted, it could not have been supposed that the regulations of commerce to be made by Congress might be of no avail to commercial corporations, or at least might be rendered nugatory, with regard to them, in consequence of state restrictions upon their power to act as corporations in any other state than that of their origin."



We may, therefore, proceed with the investigation of the case, relying upon the truth of the proposition that, if the transactions between the plaintiff and the defendant in this case were commerce among the several states, Congress alone could regulate such commerce, under the constitution of the United States, and the state had no power to regulate that commerce, or impose any obligation or exaction upon the plaintiff which it could not impose or exact upon an individual transacting the same business.

Now, we inquire, what was the nature of the business done, and was it interstate commerce? If we find that it was interstate commerce, did the statute obtain requiring the corporation to file the certificate referred to as a condition precedent to its right to purchase the wool of the defendant in the manner that it did, and was it an attempt on the part of the state to regulate commerce among the several states, and, therefore, null and void?

In the case of *Gibbons v. Ogden*, 9 Wheat. 1, Chief Justice Marshall, in one of his greatest opinions, discussed section 8, article 1, of the constitution of the United States, in which Congress has been granted the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." He said: "The subject to be regulated is commerce, and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the <sup>130</sup> meaning of the word. The counsel for the appellee would limit it to traffic—to buying and selling, or the interchange of commodities—and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce undoubtedly is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

In *Welton v. Missouri*, 91 U. S. 275, Justice Field used the following language: "'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some

subjects which are local in their operation, it has been held that the states may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority. It will not be denied that that portion of commerce with foreign countries and between the states which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation."

Again we find Justice Field defining for the court what commerce among the states consists of, as comprehended by the constitution of the United States, in the case of *County of Mobile v. Kimball*, 102 U. S. 691. He there said: "Commerce with foreign countries and among the states, strictly considered, consists in intercourse <sup>131</sup> and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules, applicable alike to the whole country, and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce."

In the still later case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 204, the same justice, speaking for the court, said: "Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed—that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to duties and other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted, are of infinite variety.

While with reference to some of them which are local, and limited in their nature or sphere of operation, the states may prescribe regulations until Congress intervenes and assumes control of them, yet when they are national in their character, and require uniformity of regulation, affecting alike all the states, the power of Congress is exclusive. Necessarily that power alone can prescribe regulations which are to govern the whole country. And it needs no argument to show that the commerce with foreign nations and between the states, which consists in the transportation of persons and property between them, is a subject of national <sup>1322</sup> character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation. Its nonaction is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise there would be no protection against conflicting regulations of different states, each legislating in favor of its own citizens and products, and against those of other states. It was from apprehension of such conflicting and discriminating state legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the states was vested in Congress."

In *McCall v. California*, 136 U. S. 104, Justice Lamar quotes approvingly the following definition of "commerce," as given by Pomeroy on page 376 of his work on Constitutional Law: "It includes," says Pomeroy, "the fact of intercourse and of traffic, and the subject matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the means, instruments, and places by and in which intercourse and traffic are carried on, and, further still, comprehends the acts of carrying them on at these places, and by and with these means. The subject matter of intercourse or traffic may be either things, goods, chattels, merchandise, or persons. All these may therefore be regulated."

In *Cook v. Rome Brick Co.*, 98 Ala. 409, the supreme court of Alabama decided that the sale of bricks in another state, to be delivered in Alabama, or the filling of an order sent from Alabama for bricks in another state, is an act of interstate commerce, not affected by the statutes of Alabama, which required a foreign corporation to have a place of business and an agent in Alabama as a condition precedent to its capacity to do business in Alabama.

A like decision was made very recently by the supreme court of Tennessee: *State v. Scott*, 98 Tenn. 254. A law of Tennessee



required every person, other than photographers of the state, who solicited pictures to be enlarged outside of Tennessee, to pay a certain sum per annum as a privilege tax. But the court held the statute unconstitutional, and used the following language: <sup>133</sup> "Enlargement of pictures by citizens of other states for citizens of this state is the primary matter, though the tax is in terms laid upon other persons engaged, as agents, in the promotion thereof. The process of enlarging involves the making of a larger picture after the image or likeness of a smaller one. When this is done by one person upon the order of another, and the larger picture is delivered, for a consideration, the parties have certainly had a commercial transaction; and if they be citizens of different states, and the picture be made in one state and sent into the other state, as indicated in the statute and averred in the presentment, the transaction, as between the principals, is, as obviously, interstate commerce. The latter is a commercial transaction between citizens of different states, and that is what 'interstate commerce' means. Whether the transaction be conducted directly or entirely by the principals themselves, or in part by the agency of another, is of no consequence. It is interstate commerce in both instances. So there is no room for doubt that the enlargement of pictures referred to in the statute, is to all intents and purposes, interstate commerce."

Now, when we apply to the facts of this case the principles of the foregoing definitions, what do we have? The plaintiff corporation sent its agent into Montana to solicit or buy wool to be consigned to its wool houses in other states, wherein it does its principal business. The agent did no other kind of business for the corporation in Montana. Such being the case, it seems clear to us his business directly pertained to interstate commerce. It related to intercourse and traffic between Montana and New York, and the subject matter of the intercourse and traffic was the wool itself. If the Northern Pacific Railroad in transporting the wool over its road between Montana and Minnesota was engaged in interstate commerce—as clearly it was—we cannot perceive how the transaction by which the wool itself was exchanged through consignment or sale by defendant to plaintiff can be excluded from any reasonable definition of "commerce among the states." The sale and exchange of wool is among the great <sup>134</sup> operations of the commercial world. It is, like traffic in cotton or wheat or corn, a subject of frequent intercourse between citizens of the different states and different nations. The railroad transportation is a part of the commerce—the in-

strument or vehicle of intercourse; the wool, the essential subject matter of the intercourse and traffic.

It being our opinion from what we have said that the plaintiff corporation was engaged in a business which was strictly interstate commerce, no law of the state could control or restrict such commerce by exacting conditions for permitting the plaintiff to do such business. The argument that a foreign corporation has its domicile in the state from which it derives its existence, and that its right to transact business elsewhere, and to enforce its contracts made in other states, depends purely upon the comity of those states, is not pertinent. The power of a state to make discriminations in privileges granted to foreign corporations may be exercised where a foreign corporation desires to do business within the limits of the state, not strictly interstate or foreign commerce. This may be illustrated by familiar instances of cattle and sheep companies, or mining and smelting corporations, in Montana. No foreign corporation, we take it, organized for any of the purposes for which such associations are usually formed, and desirous of carrying on its business and of acquiring a domicile in Montana, can escape the consequences of omission to comply with the terms and conditions upon which it has a right to do business within the state. Indeed, such corporations, in the exercise of legislative discretion, may be excluded from the state altogether, as was laid down in *Paul v. Virginia*, 8 Wall. 168, and *Horn-Silver Min. Co. v. New York*, 143 U. S. 305. Such conditions or restrictions, however, are permissible upon the ground that a state may not be willing, upon grounds of a policy of its own, to have a corporation, even if legally created under the laws of the state of its creation, establish a business in Montana, or the state may demand of it a license tax, or the performance of any other reasonable condition, <sup>135</sup> before it can claim the same protection in the conduct of its business that is accorded to like corporations within the jurisdiction of the state: *Pembina etc. Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181.

But a most vital limitation in this respect upon the power of the state springs up where the business of the foreign corporation is commerce between the corporation, the creature of the legislature of one state, and a citizen of another state: *Pembina etc. Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181. As against all such foreign corporations engaged in interstate commerce, the state can pass no prohibitory law, constitutional or statutory, without impinging upon the commercial clause of the constitution of the United States.

The decisions of the United States supreme court justify these views. In *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 734, the court had before it statutes quite similar to those upon which respondent in this case relies; and, while the decision was based upon the ground that the statute could not affect a corporation under the laws of one state which did a single act of business in another, still there is language in the opinion recognizing the doctrine that the statute could not be construed "to impose upon a foreign corporation limitations of its right to make contracts in the state for carrying on commerce between the states, for that would make the act an invasion of the exclusive right of Congress to regulate commerce among the several states."

The implication from this language is that if a foreign corporation has sent an agent into Montana, and made a contract within the latter state for the consignment of wool between Montana and New York, no construction can be put upon the statute of Montana which would render such a contract void without invading the exclusive right of Congress. If, therefore, this contract sued upon was lawfully made, notwithstanding a statute which declares or attempts to declare it void, it follows that any legislation of the state which seeks to prevent the enforcement of the contract is equally an invasion of the exclusive right of Congress. It must be true that, if <sup>136</sup> the state cannot declare the contract void, it cannot prevent the enforcement of the contract.

In the case of *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 734, there is a brief concurring opinion by Justices Matthews and Blatchford, in which they planted themselves firmly upon the broader ground that the making of a contract in Colorado to manufacture certain machinery in Ohio, to be there delivered for transportation to the purchasers in Colorado, was commerce, and that for the state of Colorado to prohibit it, except upon conditions, was to regulate commerce between Colorado and Ohio, which lay exclusively within the province of Congress. "It is quite competent, no doubt," said Justice Matthews, "for Colorado to prohibit a foreign corporation from acquiring a domicile in that state, and to prohibit it from carrying on within that state its business of manufacturing machinery. But it cannot prohibit it from selling in Colorado, by contracts made there, its machinery made elsewhere, for that would be to regulate commerce among the states."

The facts in that case, as also in the case of *State v. Scott*, 98



Tenn. 254, heretofore cited, and that of *Bateman v. Western Star Milling Co.*, 1 Tex. Civ. App. 90, present the converse of the case at bar. The foreign corporations in all those instances were domiciled in other states, and through their commercial agents solicited business and sold and shipped goods to points in the other states, in which laws existed imposing upon foreign corporations compliance with certain conditions precedent to their right to do business within such states. But the opinions were all based upon the reasoning that the goods sold were commodities subject to barter and sale, and that the sale, transportation, and delivery of goods and the transaction of business between a foreign corporation of one state and a citizen of another state constituted interstate commercial transactions, which corporations, as well as individuals, could carry on free from any restraints by any state.

But, as we have heretofore seen, the transaction pertaining <sup>137</sup> to the wool shipped by the defendant to the plaintiff in this case is obviously brought within the same rule. It is just as much an interstate commerce transaction to export wool from Montana to New York as it is to import clothes made of the wool from New York to Montana. Either transaction is interstate commerce, and neither can be interfered with by local law.

Of course, this exclusive power of the regulation of interstate commerce by Congress does not interfere with the police power of the state. Police regulations often incidentally affect commerce, but they still remain police regulations. The line of distinction between an attempt to put a burden or restriction upon interstate commerce, and the police power of the state, has been very recently discussed by Judge Grosscup in *In re Lebolt*, 77 Fed. Rep. 587, who thus expressed himself:

"The supreme court of the United States, in an unbroken line of decisions, has held that any attempt to put any burden or restriction upon interstate commerce, either by the way of taxing it, or requiring a license from its agents or drummers, is a discriminating license or tax upon any of its goods or products, is outside the power of a state, and an infringement upon the powers of the national government. The government of the United States has control and exclusive power to regulate interstate commerce. The government of the state has the power to look after police regulations, such as affect the life, health, or morals of the citizens."

The decision of Judge Grosscup in the case quoted from was to the effect that an ordinance of the city of Chicago which

prohibited the sale or the offering for sale of vinous liquors in Illinois by the representative of a California association, without a license, was not an exercise of the police power of the state, but was an attempt to regulate interstate commerce, and consequently invalid. It has also been held in the case of *McCall v. California*, 136 U. S. 104, that where a statute affects commercial transactions among states only in such an indirect, incidental, and remote manner as not to burden or impede interstate commerce, it is not in conflict with the constitution of the United States. But there again a <sup>138</sup> different rule applies from that which must be applied in this case.

We do not think it necessary to proceed any further in this discussion. It has been so repeatedly held by the supreme court of the United States that every tax on interstate commerce is a burden on that commerce, and, if imposed by the legislature of a state, is illegal, that it is scarcely necessary to cite more decisions to that effect. They are referred to in *Leloupe v. Port of Mobile*, 127 U. S. 640, and are reviewed by the supreme court of Tennessee in *State v. Scott*, 98 Tenn. 254. The trend of the later decisions of the supreme court has been, we think, to extend the protection afforded to the carrying on of interstate commerce by including within the definition of the words any form of interstate commerce, "whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on": *Lyng v. Michigan*, 135 U. S. 161; *Crutcher v. Kentucky*, 141 U. S. 58; *Brennan v. City of Titusville*, 153 U. S. 302.

As the country has developed, and commercial intercourse between the citizens of the several states has expanded, and facilities for the conduct of such commerce have so vastly multiplied, the wisdom and perspicuity of the framers of the constitution in preserving in Congress the exclusive right to regulate and control such commerce, and to preserve it wholly free from any local interference or impediment on the part of the state, is too apparent to need comment. It may be safely said that one of the causes for the development of the states is the business relations between citizens of different states—relations which, in turn, exist because of the guaranty by the federal constitution that interstate commerce shall remain free from any imposition or discriminations of state legislation.

The sequel of these views is that the contract alleged to have been made between the plaintiff corporation and the defendant

was, if made as a fact, valid and enforceable; and, <sup>189</sup> the transaction being one of lawful interstate commerce, it could in no manner be affected by any statute of the state imposing conditions (not in the exercise of the police power) upon plaintiff precedent to its capacity to enter into the contract. Perhaps the legislature did not mean to extend the statute under consideration to foreign corporations engaged in interstate commerce. The presumption would be that they did not, but whatever the purpose may have been in this respect is immaterial to this discussion; for if it was intended to include such foreign corporations, we hold the statute unconstitutional in that respect.

The judgment is therefore reversed and the cause is remanded for a new trial.

Pemberton, C. J., and Buck, J., concur.

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IN THE SUBSEQUENT CASE of *Kent etc. Co. v. Tuttle*, 20 Mont. 203, it was held, citing the principal case, that if, in an action brought to recover the value of goods sold in Montana, it is admitted by the pleadings that plaintiff is a foreign corporation, and, at the time of the sale, engaged in selling goods, wares, and merchandise in that state without complying with the laws thereof relating to foreign corporations doing business therein, the plaintiff, in order to recover, must allege and prove that the delivery of the goods was an act of interstate commerce.

**INTERSTATE COMMERCE—PROTECTION OF CORPORATIONS ENGAGED THEREIN.**—The power of Congress, to regulate commerce, includes commerce carried on by corporations, as well as commerce carried on by natural persons, and a state can no more regulate commerce carried on by the former than such commerce carried on by the latter; *Gunn v. White Sewing-Machine Co.*, 57 Ark. 24; 38 Am. St. Rep. 223, and note; monographic note to *People v. Wemple*, 27 Am. St. Rep. 564.

**INTERSTATE COMMERCE—REGULATION OF FOREIGN CORPORATIONS.**—A tax may be levied by a state upon the property of a foreign corporation within its boundaries, although that corporation is an agency of interstate commerce, but a statute imposing a tax which is essentially a burden upon the business of such a corporation, is an attempted exercise of a power belonging to the national government, and must be held invalid: *Commonwealth v. Smith*, 92 Ky. 38; 36 Am. St. Rep. 578, and note.

**INTERSTATE COMMERCE—POWER OF STATE TO REGULATE.**—A state cannot tax nor regulate interstate commerce, nor make the payment of a tax, or the taking out of a license, a condition precedent to carrying on interstate or foreign commerce: *Osborne v. State*, 33 Fla. 162; 39 Am. St. Rep. 99, and note. See monographic note to *People v. Wemple*, 27 Am. St. Rep. 547-568, as to the constitutionality of state regulations of interstate commerce; also, *Huntington v. Mahan*, 142 Ind. 695; 51 Am. St. Rep. 200; *Bloomington v. Bourland*, 137 Ill. 534; 31 Am. St. Rep. 382, and notes.



## FITZPATRICK v. MONTGOMERY.

[20 MONTANA, 181.]

**MINES AND MINING—RIGHT TO DEPOSIT TAILINGS IN STREAM.**—One engaged in mining has the right to deposit his tailings in a running stream to a reasonable extent, but he has no right to flood a lower owner's land, and by depositing tailings and debris thereon to substantially injure or ruin the latter's property, although he has used all reasonable means to prevent such damage.

C. B. Nolan and E. Scharnikow, for the appellant.

O. B. O'Bannon and Rogers and Rogers, for the respondent.

**184** PEMBERTON, C. J. The appellant says: "The only questions presented by this appeal are, first, whether the court is correct in its conception of the law that in placer mining the operator becomes responsible at all events where any damage results from his mining operations, and that the question of care in conducting his business becomes absolutely immaterial; and this question is raised in the record by the exclusion of evidence offered to show the care exercised by the defendant in his mining operations to prevent damage to plaintiff's land, and in the instructions given to the jury."

The other question is as to whether the court erred in instructing the jury upon the assumption that the plaintiff had the prior right to the waters of Buffalo creek.

There is no contention that the evidence is insufficient to support the verdict. Appellant says there was no evidence introduced to show priority of right to the waters of the stream in the plaintiff. We think there is evidence that plaintiff had located on the land in question, and had taken out a part of the waters of said stream by means of an irrigating ditch, prior to the time defendant commenced his mining operations on the creek. But, be this as it may, we think this question unimportant, even if it be conceded that there was technical error in the giving of the instruction complained of. The material question in the case is not as to who had the prior right to the use of the waters of the stream.

On the trial the defendant contended that, if he did damage the plaintiff's land by his mining operations, he could not prevent it by any effort he could make; that he used all reasonable means to prevent such damage; that he was engaged in mining; that he was guilty of no negligence in mining his ground; and that, if the plaintiff was damaged, he is without remedy. The defendant, in support of this defense, offered to

prove what he did, and the means he used to prevent damage to plaintiff's land. The court excluded this offered proof, and charged the jury that it was immaterial whether defendant could have prevented the damage to plaintiff's land <sup>185</sup> resulting from defendant's mining operations or not, and that, if defendant damaged plaintiff's land, he was liable, whether he could have prevented it or not. In this action of the court is found the only important or serious question presented by the appeal.

In all the states of the Union where mining has been at all extensively engaged in, especially in the northwestern states and territories, the question here presented for determination has been a fruitful source of litigation. Under the common law the owner of land through or along which a stream flowed had a right to have it flow in its natural channel, undiminished substantially in quantity, and unpolluted in quality, whether he derived any practical benefit from such stream or not. This doctrine has been departed from, if, indeed, it ever was recognized as the rule of law in the gold mining states and territories of the northwestern part of the Union, and especially so in the Pacific states and territories. There the right to appropriate water for mining and other useful purposes is as old as the settlement and civilization of such states and territories. The right to appropriate water on the public lands by miners and for other useful purposes was long ago recognized by Congress. We think it may be safely said that the right to appropriate water for mining, and other useful purposes, is settled as the law in all the mining states of the West. It is certainly the settled rule in this state: *Atchison v. Peterson*, 1 Mont. 561; *Gallagher v. Basey*, 1 Mont. 457. California, it is true, by a divided court has confined the right to make such appropriation to waters on public lands, holding that the purchaser of lands from the government takes the same with all the common-law riparian rights attached: *Lux v. Haggin*, 69 Cal. 255.

The Oregon supreme court, in *Curtis v. La Grande etc.* Water Co., 20 Or. 34, followed the rule announced by the California court. But this restriction is not recognized in Nevada or Colorado, nor in any other of the mining states or territories, that we are aware of: *Jones v. Adams*, 19 Nev. 78; 3 Am. St. Rep. 788; *Reno Smelting etc. Works v. Stevenson*, 20 Nev. 269; 19 Am. St. Rep. 364; *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443; *Golden Canal Co. v. Bright*, 8 Colo. 144.

But the right to appropriate the water of the streams in the states and territories above mentioned has, we believe, been

universally held to be a right with certain restrictions and limitations.

*Atchison v. Peterson*, 1 Mont. 561, and *Gallagher v. Basey*, 1 Mont. 457, were both appealed from the supreme court of Montana to the supreme court of the United States, and are reported, respectively, in 20 Wall., at pages 507 and 670. In both these cases the rule is clearly announced that the right to appropriate water in the states and territories where the doctrine of appropriation prevails is a limited or restricted right. The right to appropriate water for mining purposes, to propel machinery in mills, to irrigate agricultural land, and for like purposes, is recognized as well for one purpose as for another. The appropriation must be for a useful purpose, and "is limited, in every case, in quantity and quality, by the use for which the appropriation is made": *Atchison v. Peterson*, 20 Wall. 507.

In *Basey v. Gallagher*, 20 Wall. 670, Mr. Justice Field, delivering the opinion of the court, said: "Water is diverted to propel machinery in flourmills and sawmills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual."

The appropriator of water does not become the owner of the water by the act of appropriation. He acquires the right to the use of the water for some useful purpose. The miner, the millman, and agriculturist all have an equal right to appropriate<sup>187</sup> water. The appropriator for one useful purpose has no preference or superior right in law to an appropriator for any other purpose. While any person is permitted to appropriate water for a useful purpose, it must be used with some regard for the rights of the public. The use of water in this state is declared by the constitution to be a public use: Const., art. 3, sec. 15. It is easy to see that, if persons by appropriating the waters of the streams of the state became the absolute owners of the water without restriction in the use and disposition thereof, such appropriation and unconditional ownership would result in such a monopoly as to work disastrous consequences to the people of the state. The tendency and spirit of legislation and



adjudication of the northwestern states and territories have been to prevent such a monopoly of the waters of this large section of the country, dependent so largely for prosperity upon an equitable, and, as far as practical, free, use of water, by appropriation. But we will not further discuss this feature of the question presented by this appeal.

The contention of the appellant is that he is engaged in mining; that he has a right to use the water of the stream mentioned in the complaint in his business; that if he made proper effort to prevent injury and damage to the plaintiff, and was unable to prevent such damage, he is not responsible, and the plaintiff is without remedy.

We believe that the right to deposit tailings in a running stream to a reasonable extent is permissible in the mining states and territories, but this rule has never been carried to the extent of permitting the miner to flood his neighbor's land, and, by depositing tailings and debris thereon, to substantially injure or ruin his neighbor's property.

In *Hobbs v. Amador etc. Canal Co.*, 66 Cal. 161, it is said: "No person, natural or artificial, has a right, directly or indirectly, to cover his neighbor's land with mining debris, sand, or gravel, or other material, so as to render it valueless."

Our own court, in *Lincoln v. Rodgers*, 1 Mont. 217, held <sup>188</sup> that the first locators of mining ground have no right, by custom or otherwise, to allow tailings to run free in the gulch, and render valueless the mining claims of subsequent locators below them. And in *Nelson v. O'Neal*, 1 Mont. 284, the supreme court held that, while miners had the right to the free use of the channel of the creek, so that the water will flow from the ground, they have no right to fill the channel with tailings that will flow down upon the claims of other miners. And it makes no practical difference how careful a miner may be in working his mine, if he actually injures his neighbor's property, he is responsible, notwithstanding the effort he makes or means he uses to prevent such injury: *Hill v. Smith*, 27 Cal. 476; *Levaroni v. Miller*, 34 Cal. 231; 91 Am. Dec. 692.

Nor is the contention that it was necessary to damage plaintiff's land in order that the defendant might carry on his mining operations successfully available as a defense: *Esmond v. Chew*, 15 Cal. 137.

Upon this question it is said in *Columbus etc. Iron Co. v. Tucker*, 48 Ohio St. 41, 29 Am. St. Rep. 528: "The further

claim of the company that it had the right to make the deposits in the places complained of because it was necessary to the successful conduct of its own business to so place them, seems no less wanting in substance. The effect is to measure the rights of the plaintiff in his lands, and in the waters of the Monday creek, by the convenience or necessity of the company's business."

In *Robinson v. Black Diamond Coal Co.*, 57 Cal. 412, 40 Am. Rep. 118, a similar case to the one under consideration, the court said: "But the plaintiff's evidence, as we view it, tends to prove another and very material fact, viz., that said refuse matter was the product of the defendant's mining operations, and was deposited in said creek through agencies controlled by the defendant, and that, although it was not responsible for the inundation of the plaintiff's land by the water of said creek, it was responsible for the deposit of the deleterious substances with which said water was charged, through its agency, upon said land. This does not in any manner involve the question of the defendant's <sup>180</sup> right to mine or prosecute any other legitimate business upon its premises. It would not be claimed that the defendant could convey and deposit refuse matter from its mine upon the plaintiff's land by means of carts or cars without incurring liability for any damages which the plaintiff might suffer by reason thereof. And we know of no principle upon which it could be held that a person may escape liability by doing that indirectly which would render him liable if done directly."

In *Pumpelly v. Green Bay Co.*, 13 Wall. 166, it is said by the court "that, where real estate is actually invaded by superinduced additions of water, sand, earth, or other material, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the constitution."

In discussing the doctrine here involved, the supreme court of California, in *People v. Gold Run etc. Min. Co.*, 66 Cal. 138, 56 Am. Rep. 80, said: "Undoubtedly, the fact must be recognized that in the mining regions of the state the custom of making use of the waters of streams as outlets for mining debris has prevailed for many years; and as a custom it may be conceded to have been founded in necessity, for without it hydraulic mining could not have been economically operated. In that custom the people of the state have silently acquiesced, and upon the strength of it mining operations, involving the investment and expenditure of large capital, have grown into a legitimate business, entitled equally with all other business

pursuits in the state to the protection of the law. But a legitimate private business, founded upon a local custom, may grow into a force to threaten the safety of the people and destruction of public and private rights, and when it develops into that condition the custom upon which it is founded becomes unreasonable, because dangerous to public and private rights, and cannot be invoked to justify the continuance of the business in an unlawful manner. Every business has its laws, and these require of those who are engaged in it to so conduct it as that it shall not violate the rights that belong to others. Accompanying the ownership of every species of property is a corresponding duty to so use it as that it shall not abuse the rights of other recognized owners."

<sup>190</sup> We think, however, as is held by the authorities, that each case of this character should be determined by its own facts and circumstances. Persons appropriating water cannot avoid fouling and obstructing, and, to some extent, diminishing, the quantity of water in a stream. These things are unavoidable, and are permitted to a reasonable extent in the right use of the water. Verdicts and judgments for fanciful or insignificant damages in such cases, ought not to be rendered. Courts are very cautious and ought to be so, in issuing injunctions in such cases, as more damage may be done by the injunction than could be prevented by its issuance. It is a field of litigation filled with great annoyance and difficulty to both legislatures and courts. It will continue to be such as long as the interests of men conflict.

As far as the case under discussion is concerned, we think, under the view we take of the authorities we have consulted in a very full consideration of the case, that the plaintiff has a meritorious cause of action against the defendant for actual damage done to his lands. The plaintiff is evidently the prior appropriator of the waters of the stream mentioned in the complaint, although no particular stress was placed upon the question of priority on the trial of the case.

We see no error in the action of the court in excluding the testimony offered by defendant to prove the effort he made, and his inability to prevent damage to plaintiff; nor in the giving of the instructions by the court upon that theory of the law, which action is assigned as the principal error in the case.

The doctrine involved in this case is thoroughly and ably discussed by Mr. Curtis H. Lindley, of the San Francisco bar, in his treatise on the American Law Relating to Mines and Mineral Lands, in sections 838 to 853, inclusive, and the authorities are



collated and cited. Especial reference is made to this able work, and the authorities cited by the author.

The judgment and order appealed from are affirmed.

Hunt and Buck, JJ., concur.

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**MINES AND MINING—RIGHT TO DEPOSIT DEBRIS.**—The debris litigation in California has determined that neither legislation nor custom can give mine-owners, on streams, the right to deposit therein debris which is carried down to the injury of lower proprietors. The cases are collected, and the question discussed, in the monographic notes to *Mississippi Mills Co. v. Smith*, 30 Am. St. Rep. 551-557, and *McClintock v. Bryden*, 63 Am. Dec. 98-100. See, also, *Columbus etc. Coal etc. Co. v. Tucker*, 48 Ohio St. 41; 29 Am. St. Rep. 528, and note.

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## HELENA NATIONAL BANK v. ROCKY MOUNTAIN TELEGRAPH COMPANY.

[20 MONTANA, 379.]

**PLEADING.**—If, in an action against a corporation, the complaint alleges that a note sued upon was executed by the defendant, while the answer denies that defendant executed the note, or that he authorized the person who signed his name thereto, the ultimate fact, the execution of the note by defendant, is properly alleged in the complaint; and the allegation, in the answer as to the agency is new matter requiring no denial by replication.

**AGENCY—POWER OF AGENT TO EXECUTE NEGOTIABLE PAPER.**—An agent with general authority to manage his principal's business, has, by virtue of his employment, no implied authority to bind his principal by making a negotiable instrument. Such authority must be expressly conferred, or be necessarily implied from the exigencies and the general course of the particular employment, or the act must be ratified by the principal. This rule is applicable to the managing agent or general manager of a nontrading corporation, as well as to the agent of a natural person.

**AGENCY—POWER OF AGENT TO EXECUTE NEGOTIABLE PAPER.**—The fact that an agent has on different occasions executed notes in the name of his principal, does not show authority so to do, especially when it appears that the principal had no knowledge of such transactions until after the agency had ceased.

**AGENCY—POWER OF AGENT TO EXECUTE NEGOTIABLE INSTRUMENTS.**—The fact that an agent is general business manager for his principal, and that he drew checks against the funds of the latter, does not tend to establish his authority to execute negotiable instruments in the name of his principal.

**AGENCY—NOTICE OF POWER OF AGENT.**—The payee of a note is bound to know that the principal is not liable upon a note executed by an agent not clothed with power to act in that behalf.

**NEGOTIABLE INSTRUMENTS—ASSIGNMENT.**—One who acquires a note by assignment acquires no better title than had the payee.

**AGENCY—POWER TO PLEDGE CREDIT.**—An agent who is the general business manager of a nontrading corporation has implied power to borrow money therefor in an amount not disproportionate to the volume of business transacted, when it appears that the principal had knowledge that the monthly receipts of the business were less than the expenses, and that it was necessary for the agent to maintain a bank account in the name of the corporation.

**PRACTICE.**—If, in a civil action, the facts are admitted or undisputed, the only questions for decision are those of law.

Clagberg and Corbett and J. B. Wellcome, for the appellant.

Toole and Wallace, for the respondents.

<sup>386</sup> **PIGOTT, J.** 1. Appellant (defendant) contends that its motion for judgment on the pleadings in action No. 878 should have been sustained, upon the ground that the replication did not deny the averment in the answer of want of authority in Ridgway to execute the note in its behalf; the theory being that such averment was new matter, constituting a defense, and therefore admitted for want of denial.

We are satisfied that the averment is not new matter. Ultimate facts only should be pleaded. Plaintiff pleaded the ultimate fact according to its legal effect, by alleging that defendant made the note. This ultimate fact the defendant denied. Corporations necessarily act entirely through agents in all transactions having no relation to the corporation in its corporate capacity, and, under the statement that the corporation executed the note, plaintiff would have been entitled to <sup>387</sup> prove that any authorized agent of the corporation issued the paper in its behalf. The denial in the answer raised the issue whether the note was executed by the corporation through any authorized agency. It was not necessary in law, under the issue raised by the averment and denial of the making, for plaintiff to prove that Ridgway had authority to act; and the so-called "separate defense" was, in legal effect, but a claim that one certain person was without legal authority to perform that which plaintiff charged the corporation with doing; non constat that some duly empowered agent did not deliver the note. As a matter of pleading, as distinguished from evidence, it was unimportant whether or not Ridgway possessed the power to bind the corporation. The manner, as well as the means, of execution, is mere evidence. That portion of the answer setting up so-called "separate defense" consists of evidential matter, the proof of which might or might not become material on the trial. Viewing it in the light most favorable to defendant, the separate defense pleaded was

wholly evidence and therefore redundant. Nor might defendant, by answer, limit the issue to the question of Ridgway's authority.

We have dwelt upon this question of pleading for the reason that appellant has so strenuously and seriously defended its position.

The issues made by the pleadings in No. 878 were, upon trial, narrowed to the question whether Ridgway was clothed with authority to make the note in defendant's name, and whether, in the absence of such authority, the defendant ratified his act in its behalf. If there was any substantial evidence tending to prove such authority or such ratification, the duty would devolve upon this court to determine the many errors claimed to have been committed by the court below in admitting evidence, unless, under the competent evidence, the jury, as a matter of law, ought to have found for plaintiff.

Upon careful consideration of all the evidence in the record, we are of opinion that plaintiff failed to make a case for the jury, and the court should have granted the motion for nonsuit. <sup>388</sup> An agent with general authority to manage his principal's business has, by virtue of his employment, no implied authority to bind his principal by making a negotiable instrument. Such authority must be expressly conferred, or be necessarily implied from the exigencies and the general course of the particular employment, or the act must be ratified by the principal: See *Mechem on Agency*, sec. 398. This rule is applicable to the managing agent or general manager of a nontrading corporation, as well as to the agent of natural persons: *Oak Grove etc. Co. v. Foster*, 7 N. Mex. 650; *Edwards v. Carson Water Co.*, 21 Nev. 469; *Thompson on Corporations*, sec. 4850. The power given to the business manager of such a corporation to transact its business does not authorize him to bind the corporation as maker of a negotiable note: *Culver v. Leovy*, 19 La. Ann. 202; *Oak Grove etc. Co. v. Foster*, 7 New Mex. 650. The English rule is even more strict than the American: See *In re Cunningham*, L. R. 36 Ch. Div. 532.

Argument is not needed to show the extraordinary and well-nigh unlimited power conferred upon an agent who has authority to make negotiable notes in his principal's name. An agent with such authority has, for practical purposes, full power to wreck the corporation by putting out its paper, to which paper, in the hands of a good faith indorsee before maturity, no defense can be made.



As said by Mr. Justice Cooley in *New York Iron Mine v. First Nat. Bank*, 39 Mich. 644, a case involving questions akin to those arising in the case at bar: "The issuing of promissory notes is not a power necessarily incident to the conduct of the business of mining, and it is so susceptible of abuse, to the injury, and, indeed, to the utter destruction of a corporation, that it is wisely left by the law to be conferred, or not, as the prudence of the board of directors may determine."

The doctrine approved by us finds clear expression in the opinion of the supreme court of Arkansas in *Geyer v. King*, 61 Ark. 631. The opinion in that case contains a review of the authorities, and a thorough exposition of the principles applicable to the case at bar.

<sup>389</sup> The presumption of law is more strongly opposed to an implied authority to execute negotiable instruments than to do anything else, and even where there is a general authority "to transact all business" or "to do all lawful acts concerning all the principal's business of whatever nature or kind soever," it is very generally held that the power to execute bills or notes is not included: *Tiedeman on Commercial Paper*, sec. 77.

The case at bar is to be distinguished in its facts, or upon principle from all the cases cited by plaintiff, with the possible exception of *Grommes v. Sullivan*, 26 C. C. A. 320; 81 Fed. Rep. 45. We believe the doctrine announced in that case to be contrary to the great weight of authority, and that it should not be followed.

In *Glidden Varnish Co. v. Interstate Nat. Bank*, 16 C. C. A. 534, 69 Fed. Rep. 912, upon which plaintiff so much relies, the facts were that the defendant was a trading and manufacturing corporation of Ohio, having a branch in Missouri, at which a large business was carried on, in the purchase and working up of raw material, and the sale of the finished product over a large territory. This branch was conducted by a general agent and manager, who was in full control of all departments of the business conducted in Missouri, and managed all its affairs, financial and otherwise, with the knowledge and consent of the corporation, and usually without direction and oversight by its officers. From time to time he reported to his principal, and some of his reports showed entries of bills payable. This general manager made notes in the name of the corporation, by himself, as treasurer; and, upon the trial of an action upon them, it was proved that the president knew that the manager had been signing all the bills payable made by the Missouri branch, for goods pur-

chased. The president of the corporation testified that it was the natural order of things for the manager to procure their discount by indorsing them as treasurer, and that, if the money was required in an emergency, he supposed the agent would be expected to make notes for the corporation, and cause them to be discounted. Under these circumstances the court held <sup>390</sup> the jury warranted in finding the agent clothed with implied authority to execute the notes. In the course of the opinion, the court made some observations not necessary to a decision, to the effect that the general manager of a manufacturing and trading corporation, who is authorized to buy and sell goods, to carry on the business, and to take and discount promissory notes for his principal, is thereby vested with implied power to execute notes for his principal, and that such general agent is presumed to have the same authority to execute notes in behalf of the corporation that a reasonably prudent merchant or manufacturer has to make notes for himself. These observations were obiter dicta.

In all the other cases cited by plaintiff there was express or implied authority in the agent, a ratification of his acts, usage rising to the dignity of a custom, or estoppel. For example, in *Bates v. Keith Iron Co.*, 7 Met. 224, the managing agent of a manufacturing corporation executed a note in its name for the amount of wages admittedly due from his principal. The court was inclined to the opinion that the directors had held the agent out as authorized to make notes, and might well have put the decision reached upon that fact. Whatever may be the principle applicable in this respect to trading or manufacturing corporations, there is nothing in the nature of the business of a corporation organized for the purpose of operating a telegraph line, or of the duties of its general manager, which implies authority in such agent to make negotiable paper: *Craft v. South Boston R. R. Co.*, 150 Mass. 207.

There was no express authority conferred upon Ridgway to make the notes in behalf of the defendant. If the admissibility of the document alleged to have been issued by Clark and the Standard Company be conceded, we find that it merely conferred upon Ridgway "full power to manage the business of the Rocky Mountain Telegraph Company, and make all necessary contracts and arrangements in carrying on and operating said business." This, under the authority of adjudicated cases, and upon principle, was insufficient. Nor <sup>391</sup> was such power necessarily implied from the exigencies or general course of the business: *New*

York Iron Mine v. First Nat. Bank, 39 Mich. 644. Neither was there a ratification by defendant of the acts of Ridgway, nor a recognition of the note as its paper. Neither was there proof of custom, habit, or course of business pursued by defendant or by Ridgway, from which his authority to make negotiable notes could be implied or inferred. On three occasions, it is true, he did execute notes in the defendant's name, but there is no proof that these instances were ever brought to its knowledge until after Ridgway ceased to be its manager: *Elwell v. Puget Sound etc. R. R. Co.*, 7 Wash. 487. Nor was there sufficient publicity in the doing of the acts mentioned to warrant the inference that defendant had knowledge of them. The drawing of checks by Ridgway against the funds of the defendant did not tend to establish a usage as to the giving of negotiable promissory notes: *Oak Grove etc. Co. v. Foster*, 7 New Mex. 650.

The defendant was not negligent in failing to obtain information in respect of the notes. In order to charge the defendant upon the principle of negligence, there must have been a duty devolving upon defendant, and a neglect to perform that duty. The duty of suspecting its agent of exceeding its authority was not incumbent upon it. It was justified in trusting to the presumption that he would act within the sphere or orbit of the power delegated to him. Moreover, the payee of the note was bound to know that the law would not charge the defendant upon a note executed by an agent not clothed with the power to act in that behalf.

Plaintiff acquired the note by assignment, not by indorsement, and therefore acquired no better title than had the payee. Indeed, as between the parties, the effect of the note, if binding on defendant, was an account stated in writing, containing an express promise to pay the amount found to be owing, and the further promise to pay interest thereon at the rate of one per cent per month and reasonable attorney's fees. But the question is not as to the effect of the note under the <sup>392</sup> circumstances of the particular case, but of the power in the agent to execute an instrument negotiable in form—"a courier without luggage"—which in the hands of an indorsee in due course would not be open to defenses. We do not wish to be understood as denying the right of plaintiff to maintain an action for recovery of the debt (if any there was) for which Ridgway attempted to make the note. No such question arises, since the only subject of the action is the supposed note, and the only cause of action



is the failure of the defendant to perform the alleged contract contained in the note.

For the foregoing reasons, the order appealed from in action No. 878 is reversed, and the cause remanded for a new trial.

Reversed and remanded.

2. Action No. 877 presents the question whether Ridgway, the general manager, was, under the facts disclosed by the evidence, authorized to pledge the credit of his principal for the overdraft of three hundred and fifty dollars. We are clearly of the opinion, under the facts admitted and thus proved without objection on the part of the defendant, that the apparent power was, by implication, delegated to him. He was the general manager of the defendant, in full charge of its ordinary business and transactions. The defendant is charged with notice that the receipts of the business were much less than the outlay each month, the deficit during one month being in excess of one thousand dollars. It knew, or ought to have known, that its general manager would, in the ordinary and prudent conduct of the business intrusted to him, borrow from time to time such moneys as were requisite to meet these expenses. It knew that it did not advance funds in anticipation of a deficit.\* It must have known, and was negligent if it did not know, that a bank account in its name was proper and necessary to be kept at Helena by the manager. It ought to have known that the agent would probably provide for paying that portion of the current expenses the liquidation of which could not be delayed, by obtaining a temporary loan from the defendant's banker.

<sup>393</sup> The corporation had power to borrow money so far as necessary to effectuate its legitimate purposes. The trustees were its business agents, and in them resided its entire power touching the transactions of its business, and they possessed this power, the delegation of which by them to the general manager the law sanctioned. That power, so far as it was to be exercised by reason of temporary necessity from day to day or month to month, was, by plain and unmistakable implication, delegated by the trustees to Ridgway. No fraud or collusion is charged to have existed between the bank making the loan and Ridgway; nor was the amount of the loan so disproportionate to the business transactions carried on by Ridgway as to suggest to the lender that Ridgway might be obtaining the money for his own use; nor was it necessary for the plaintiff to show an actual appropriation to defendant's use: Thompson on Corporations, secs. 5706, 5707. Neither is it to be presumed that the

agent acted in bad faith. On the contrary, as between defendant and plaintiff, the presumption of right acting upon the part of the agent is indulged. While persons dealing with agents of corporations are required to take notice of the extent of the powers conferred, to require them to have knowledge of the propriety of its exercise in the particular case would often result in gross injustice. "Especially is this so where the agent or officer of the corporation which exercises the power at the time represents the corporation, and speaks for it in giving information as to the circumstances under which it is executed": *Thompson on Corporations*, sec. 4889.

We have examined all the cases cited by defendant, as well as many others, and find none of them conflicting with the principles declared in this opinion to be applicable to the facts here shown to exist.

The allegations of the complaint were established by admissions of the defendant, and by credible evidence, and were undisputed by countervailing proof. Where, in a civil action, the facts are admitted or undisputed, or where the evidence is "all in one direction," the only questions for decision are those of law. There being no conflict in the evidence, and the <sup>394</sup> proofs being such that reasonable men could come to but one conclusion upon them, the case presents, in effect, an agreed statement of facts: *Emerson v. Eldorado Ditch Co.*, 18 Mont. 247; 2 *Thompson on Trials*, secs. 2245, 2262; *Wabash Ry. Co. v. Williamson*, 104 Ind. 154; *Orleans v. Platt*, 99 U. S. 676; *Grand Chute v. Winegar*, 15 Wall. 355; *Cahill v. Chicago etc. Ry. Co.*, 20 C. C. A. 184; 74 Fed. Rep. 288; *Martin v. Ward*, 69 Cal. 132; *National Bank v. Galland*, 14 Wash. 502.

The order denying a new trial of action No. 877 is affirmed.

Pemberton, C. J., and Hunt, J., concur.

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**AGENCY—POWER OF AGENT TO EXECUTE NOTE IN PRINCIPAL'S NAME.**—Wherever an agent is empowered to do a particular thing, he is also empowered to use the means necessary to accomplish it: *Merchant's Bank v. Central Bank*, 1 Ga. 418; 44 Am. Dec. 665. The authority to sign accommodation paper must be specially given, unless the authority of the agent is one of universal agency; and it is not established by proof of an agency, however general, in the transaction of the principal's business, even though in connection with such business it be shown that the agent was authorized to make notes in the name of his principal: *Gullick v. Grover*, 33 N. J. L. 463; 97 Am. Dec. 728, and note. And authority to make a promissory note and bind his principals for labor and materials, is not given by implication from the nature of the business, to an agent employed in the manufacture of carriages: *Paige v. Stone*, 10 Met. 160; 43 Am. Dec. 420, and note. See,

also, *Bank of Deer Lodge v. Hope Min. Co.*, 3 Mont. 146; 35 Am. Rep. 458; *Pauly v. Pauly*, 107 Cal. 8; 48 Am. St. Rep. 98, and note.

**AGENCY—POWER OF AGENT TO BORROW IN PRINCIPAL'S NAME.**—If the transaction of a business carried on by an agent for his principal, absolutely requires the exercise by the agent of the power to borrow money in order to carry it on, then such power is impliedly conferred as an incident to the employment; otherwise it is not: *Consolidated Nat. Bank v. Pacific Coast etc. Co.*, 95 Cal. 1; 29 Am. St. Rep. 85, and extended note.

**AGENCY—DUTY OF PERSONS DEALING WITH AGENT.**—No one has a right to rely on statements of an agent concerning his own agency: *Bond v. Pontiac etc. R. R. Co.*, 62 Mich. 643; 4 Am. St. Rep. 885. But one dealing with an authorized agent is bound to inquire and ascertain the extent of his authority: *Busch v. Wilcox*, 82 Mich. 336; 21 Am. St. Rep. 563, and note; *Farrington v. South Boston R. R. Co.*, 150 Mass. 406; 15 Am. St. Rep. 222.

**NEGOTIABLE INSTRUMENTS—RIGHTS OF ASSIGNEES.**—The assignee of a note takes it subject to all available defenses existing at the time of assignment: *Bowman v. Halstead*, 2 A. K. Marsh. 200; 12 Am. Dec. 380. And the assignment of a note before maturity by the payee without indorsement, transfers the payee's rights only: *Haskell v. Mitchell*, 53 Me. 468; 89 Am. Dec. 711.

## STENBERG v. LIENNEMANN.

[20 MONTANA, 457.]

**MECHANICS' LIENS—STATUTORY CONSTRUCTION.**—A statute authorizing a lien against a building erected by a lessee and his interest under the lease, should not be extended in its operation by implication. It should be construed to embrace only such buildings as the lessee might himself, at common law, remove at any time during his term, before surrendering possession.

**MECHANICS' LIENS—LEASED PREMISES.**—Mechanic's lien for material and labor furnished at the request of a lessee, who subsequently forfeits his lease, embraces only such improvements as the lessee might have removed during the term, and does not include such improvements or repairs as cannot be removed without injury to the leased premises.

Carroll & Leehey, for the appellant.

C. Mattison, for the respondents.

<sup>460</sup> PEMBERTON, C. J. Section 2133 of the Code of Civil Procedure provides as follows: "The lien given extends to the lot or land upon which any such building, improvements, or structure is situated, to the extent of one acre, if outside of any town or city, or within any town or city, then to the extent of the whole lot or lots upon which the same is situated, if the land belonged to the person who caused said building to be constructed, altered, or repaired; but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien."



Section 2134 of the same code provides: "When the interest in the land, building, structure, or other improvement, is a leasehold interest, the forfeiture of such lease does not forfeit or impair such liens so far as concerns the buildings, structures, and improvements put thereon by the person charged with such lien, but the same may be sold to satisfy said lien, and may be removed within twenty days after the sale thereof by the purchaser."

In deciding the case the court evidently found and held that the work and labor performed and materials furnished by plaintiff and his assignor, Britton, did not constitute such "buildings, structures, and improvements" as could be removed from the premises, or buildings on the premises, at the time and before the plaintiff and his assignor performed the work and furnished the materials for which a lien is claimed. Appellant assigns this decision of the court as error.

<sup>461</sup> In a case like this we think our statute gives a lien only such "buildings, structures, and improvements" put upon the premises by the leaseholder as can be removed. Jones, in his work on Liens, says: "If the materials furnished are used in repairs, and are so merged in the freehold as to be incapable of severance, the contractor has no lien thereon, but merely a lien on the leasehold estate": 2 Jones on Liens, sec. 1274.

The same author says: "Lien not extended beyond lessee's interest. A statute authorizing a lien against a building erected by a lessee and his interest under the lease should not be extended in its operation by implication. It should be construed to embrace only such buildings as the lessee might himself, at common law, remove at any time during his term, before surrendering possession": Jones on Liens, sec. 1275. See, also, *Rothe v. Bellingrath*, 71 Ala. 55; *Lothian v. Wood*, 55 Cal. 159.

The facts in this case are that Britton cut a doorway between the two buildings, and nailed and fitted a bar to the floor and wall of one of the buildings on which a lien is sought to be enforced. The plaintiff furnished some materials, such as paper, paint, etc., which he used in papering, painting, and cal-cimining parts of the houses. Now, how can that sort of work or repairs or materials be removed from the leased premises? The lessees could not do it. If they had no such right or interest in the premises as would permit them to remove such repairs, how can the plaintiff do so, who only has a lien, under the statute, on the interest the lessees had in the premises? As a matter of common sense, what did the lessees, or the plaintiff,

or his assignor, Britton, put upon the premises that can be removed? You cannot remove the hole Britton cut in the wall to connect the two buildings. The bar cannot be removed, for it is the property of the lessors of the premises. The paper, paint, and calcimine cannot be taken from the walls.

There is nothing shown to have been put upon the premises by the lessees that is susceptible or capable of severance or <sup>462</sup> removal. We think, therefore, that there was no error in the holding and decision of the court in this respect.

But the appellant insists that the forfeiture of the lease by the lessees does not affect the right of the plaintiff to a lien. Suppose we admit this contention. Suppose the lessees had not forfeited their lease, and were now in possession of the premises, what is there in the premises in the way of "buildings, structures, and improvements," or anything else, placed there by the lessees or the plaintiff and Britton, that could be removed, and sold to satisfy the lien claimed by plaintiff?

The court found, and rightly, too, that there was never any contract between plaintiff and Britton and the lessors by which the lessors became in any way liable for the accounts for which a lien is claimed in this action. On the contrary, the evidence shows that the lessors told the plaintiff and Britton, when they commenced to do the work and furnish the materials sued for, that they must look alone to Johnson & Ryan, the lessees, for their pay.

There is, in our opinion, no fact or circumstance disclosed by the record, nor any rule of law cited by counsel, that would authorize a judgment against defendants Liennemann & Schmidt, the owners and lessors of the premises in suit, or the sale of their property to satisfy the claims of plaintiff.

The judgment appealed from is affirmed.

Pigott, J., concurs.

Hunt, J., not sitting.

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**MECHANIC'S LIEN—LEASEHOLD INTEREST—STATUTORY CONSTRUCTION.**—A statute conferring a mechanic's lien upon a leasehold interest in land, must be construed with reference to the common-law rule that the burden of repairs is cast upon the tenant, and that the landlord is under no implied obligation to make them: *Williams v. Vanderbilt*, 145 Ill. 238; 36 Am. St. Rep. 486. The estate of a lessee, whatever its extent may be in the land or premises, is subject to a mechanic's lien, and may be sold to satisfy it: *Extended note to Lyon v. McGuffey*, 45 Am. Dec. 678. But a mechanic's lien attaching to a leasehold estate is subject to all conditions of the lease: *Williams v. Vanderbilt*, 145 Ill. 238; 36 Am. St. Rep. 486. See *Coburn v. Stephens*, 137 Ind. 683; 45 Am. St. Rep. 218, and note.

## OLESON v. WILSON.

[20 MONTANA, 544.]

**NEGOTIABLE INSTRUMENTS—JOINT MAKERS—STATUTE OF LIMITATIONS.**—One joint maker of a note by a partial payment thereof, after its maturity, without the assent or ratification of his comakers, binds only himself, so far as an extension of the statutory period of limitations is concerned.

**STATUTES—CONSTRUCTION OF, WHEN TAKEN FROM ANOTHER STATE.**—Although the construction put upon statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, yet such construction is not permitted to prevail when not in harmony with the spirit and policy of the legislation and decisions of the borrowing state.

**NEGOTIABLE INSTRUMENTS—DEMAND OF PAYMENT—STATUTE OF LIMITATIONS.**—The holder of a note due on demand must demand payment within a reasonable time, and before the right of action thereon is barred by limitation.

Action by J. Oleson, against C. E. Severance and G. R. Wilson on a note due on demand and dated October 10, 1882. C. E. Severance was principal in said note, Jacob Severance and said Wilson being sureties thereon. Jacob Severance died in 1891, some six or seven years before the commencement of this action. Wilson set up the statute of limitations as a defense to the action. Prior to the tenth day of October, 1893, C. E. Severance made several payments of interest on the note without the knowledge or authority of Wilson, who never made any payments himself. The note was first presented to Wilson for payment on September 8, 1894, when he refused payment. At the time of the execution of the note and for ten years thereafter, C. E. Severance was solvent and able to pay it, but at the time of the commencement of this action he was insolvent and so remains. Judgment in the lower court for plaintiff on the ground that the payments of interest on the note by Severance prevented the running of the statute of limitations in favor of defendant Wilson. The latter appealed.

Smith & Gormley, for the appellant.

C. B. Nolan and M. Bullard, for the respondent.

546 PEMBERTON, C. J. Counsel for appellant rely upon *First Nat. Bank v. Bullard*, 20 Mont. 118, for a reversal of the judgment appealed from in the case at bar. In that case this court held "that, under the statutes of Montana, one joint maker of a note, by a partial payment thereon after its maturity, without the assent or ratification of his comakers, binds only himself, so far as an extension of the statutory period of limitations



is concerned." The material facts upon which the plea of the statute of limitations is predicated are identical in both cases.

Counsel for the respondent contend that from the time of the execution of the note until the institution of this suit, sections 53 and 54, of the first division of the Compiled Statutes of Montana, were in force in this state, and should control in the decision of this case. These sections are as follows:

"Sec. 53. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this act, unless the same is contained in some writing signed by the party to be charged thereby; but this act shall not alter the effect of any payment of principal or interest.

<sup>547</sup> "Sec. 54. Whenever any payment of principal or interest has been or shall be made upon an existing contract, whether it be a bill of exchange, promissory note, bond, or other evidence of indebtedness, if such payment shall be made after the same shall have become due, the limitation shall commence from the time the last payment was made."

Counsel for respondent further contend that these statutes were borrowed from the state of Minnesota after they had been construed by the supreme court of that state, and that this court is bound by the construction given them by the supreme court of that state in *Whitaker v. Rice*, 9 Minn. 13, 86 Am. Dec. 78, and that, as the decision in *First Nat. Bank v. Bullard*, 20 Mont. 118, is in conflict with the construction given these statutes in *Whitaker v. Rice*, 9 Minn. 13, 86 Am. Dec. 78, by the supreme court of Minnesota, the construction of the Minnesota court should now be adhered to, and our own decision overruled. The question here involved was very ably and elaborately argued when *First Nat. Bank v. Bullard*, 20 Mont. 118, was before this court, as stated therein by the learned author in the opinion. An able and exhaustive argument was also made by distinguished counsel on a petition for a rehearing in that case, which, upon due consideration, we felt compelled to deny. It is not denied now, nor at any time has it been denied, by counsel, that this court followed the "more modern and best-reasoned decisions" and authorities in the conclusion we reached in *First Nat. Bank v. Bullard*, 20 Mont. 118.

The argument of counsel for the respondent is, in effect, that this court is absolutely bound by the construction given these statutes by the Minnesota court, because the statutes were borrowed from that state after being construed by its court; the

construction given becoming a part of the statutes when adopted by our legislature.

We admit "that the construction put upon statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, and that only strong reasons will warrant a departure from it": Endlich on Interpretation of <sup>548</sup> Statutes, sec. 371. Our court has always followed this rule. But we do not admit that such construction of borrowed statutes should prevail when not in harmony with the spirit and policy of our own legislation and decisions: Endlich on Interpretation of Statutes, sec. 371.

While it is true that *Whitaker v. Rice*, 9 Minn. 13, 86 Am. Dec. 78, construed the statutes under discussion, still it cannot be denied that the court, in arriving at its conclusion, was largely controlled by the language of Lord Mansfield in *Whitcomb v. Whiting*, 2 Doug. 652 (decided in 1781), to wit: "Payment by one is payment for all, the one acting virtually as agent of the rest; and in the same manner an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due."

In *Willoughby v. Irish*, 35 Minn. 63, 59 Am. Rep. 297, the supreme court of Minnesota completely overruled *Whitaker v. Rice*, 9 Minn. 13, 86 Am. Dec. 78, and repudiated the doctrine declared by Lord Mansfield in *Whitcomb v. Whiting*, 2 Doug. 652, upon which the decision is so largely predicated.

In *Willoughby v. Irish*, 35 Minn. 63, 59 Am. Rep. 297, which overruled *Whitaker v. Rice*, 9 Minn. 13, 86 Am. Dec. 78, the supreme court of Minnesota said: "Recurring to the pivotal point in this case, if there must, then, be a new promise, express or implied, to sustain an action, can one of several joint debtors, from the mere fact of the existence of the joint liability, and having no authority in respect to each other, except such as results from that relationship, by his own several act or agreement create or renew a liability as against all such debtors for a debt otherwise barred by limitation? Logically, and upon principle, there can be but one answer to this question. No such authority or agency exists, or can be implied, from the joint contract, as will authorize one to act for and bind the others, so as to renew or extend their liability. Where the relation is merely that of joint debtors, neither is the agent of the other to make a new contract with the creditor, or to bind the others by a new promise changing or affecting their legal rights, or giving such

creditor a right of action against them which he would not otherwise have. And nothing can be added to the exhaustive <sup>549</sup> and satisfactory discussion of the subject in *Bell v. Morrison*, 1 Pet. 351, and *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322, and notes; *Shoemaker v. Benedict*, 11 N. Y. 176, 62 Am. Dec. 95. . . . In *Bell v. Morrison*, 1 Pet. 351, the debt had already been barred when the new promise was alleged to have been made, and a further distinction is suggested between cases of that class and those where payments or new promises have been made before the statute has run; and upon this distinction Judge Denio grounds his dissent in *Shoemaker v. Benedict*, 11 N. Y. 176, 62 Am. Dec. 95. But it is founded upon no principle. If the agency exists in one case, it must in the other, and the same authority is required to bind one joint debtor, by the promise or partial payment of his codebtor, before as after the six years have elapsed."

It may be said in reply to this, that when *Willoughby v. Irish*, 35 Minn. 63, 59 Am. Rep. 297, was decided, the legislature of Minnesota had changed the statutes from what they were when *Whitaker v. Rice*, 9 Minn. 13, 86 Am. Dec. 78, was decided, and that we have the original statutes, and are bound by the construction given them in *Whitaker v. Rice*, 9 Minn. 13, 86 Am. Dec. 78. It is true that *Willoughby v. Irish*, 35 Minn. 63, 59 Am. Rep. 297, was decided under the amended statutes. But it is also true that *Willoughby v. Irish*, 35 Minn. 63, 59 Am. Rep. 297, repudiates the doctrine of agency or authority of the joint debtors to bind each other by part payment, announced as the basis, largely, of the opinion in *Whitaker v. Rice*, 9 Minn. 13, 86 Am. Dec. 78, which doctrine is now without the indorsement of the best authorities, and, perhaps, would long since have been discarded entirely, had it not owed its paternity, as well as weight, to the great name of Mansfield.

The Minnesota situation may, therefore, be said to be this: In *Whitaker v. Rice*, 9 Minn. 13, 86 Am. Dec. 78, decided in 1864, the supreme court of that state, under statutes just like the Montana statutes, held that a part payment of an obligation by one joint debtor prevented the running of the statute as to all. This decision, while construing the statutes then in force, was based largely on the theory that all the joint debtors were agents for each other, and had authority to extend the joint liability as to all by such partial payments without the consent, knowledge, or <sup>550</sup> ratification of their comakers. *Willoughby v. Irish*, 35 Minn. 63, 59 Am. Rep. 297, which was decided under the stat-



utes as amended, wholly repudiates the doctrine of the agency of the comakers, and their authority to bind each other, as announced in *Whitaker v. Rice*, 9 Minn. 13, 86 Am. Dec. 78. So that, while *Willoughby v. Irish*, 35 Minn. 63, 59 Am. Rep. 297, was rendered under different statutes than those construed in *Whitaker v. Rice*, 9 Minn. 13, 86 Am. Dec. 78, it also wholly overrules and repudiates the principle upon which *Whitaker v. Rice*, 9 Minn. 13, 86 Am. Dec. 78, was so largely based; and, if the supreme court of Minnesota is not bound by the principle announced in *Whitaker v. Rice*, 9 Minn. 13, 86 Am. Dec. 78, we ought not to be. Why should we be held to a construction on Minnesota statutes which have been overruled and discarded by that state's own supreme court?

But we deem it useless to consider this question at any greater length. It must be conceded that the decision in *First Nat. Bank v. Bullard*, 20 Mont. 118, is in harmony with the best recent decisions and authorities on this question, and we do not feel constrained to depart from the rule therein announced: See *Cowhick v. Shingle*, 5 Wyo. 87, ante, p. 17; *Steele v. Souder*, 20 Kan. 39.

There is some discussion as to when the note sued on became due, counsel for respondent contending it did not become due, as to appellant, until thirty days after demand, and that no demand was made of him until the eighth day of September, 1894. We think plaintiff was bound to make demand in a reasonable time. The plaintiff could not indefinitely prolong the time in which he might sue by voluntarily failing to do the things he was required to do before an action could be brought. We think he was, at any rate, required to demand payment before the right of action was barred by the statute: *Story on Promissory Notes*, secs. 207, 208; *Tiedeman on Commercial Paper*, sec. 296; *Hintrager v. Traut*, 69 Iowa, 746; *Palmer v. Palmer*, 36 Mich. 487; 24 Am. Rep. 605; *Keithler v. Foster*, 22 Ohio St. 31.

We think there is no merit in the contention of respondent that this appeal should be dismissed because no notice thereof was given to defendant Charles E. Severance. Severance was <sup>551</sup> not an adverse party to appellant, in the sense that he was entitled to notice.

The judgment appealed from is reversed, and the cause remanded, with directions to the district court to enter judgment in favor of the appellant.

Hunt, J., concurs.

MR. JUSTICE PIGOTT dissented and maintained that the decision in *First Nat. Bank v. Bullard*, 20 Mont. 118, as well as in the principal case was erroneous. He said: "The rule declared in *First Nat. Bank v. Bell etc. Min. Co.*, 8 Mont. 46, is that, when a particular statute has been adopted in this state from the statutes of another, after a judicial interpretation has been placed upon it by the parent state, the courts of this state are bound by the interpretation or construction of the courts of the state whence it was adopted, unless the circumstances of the people of this state are so different as to require the application of another rule. To the same effect is *Territory v. Stears*, 2 Mont. 324. At page 330, the court say: 'Our statute is a re-enactment of that of California, and the construction placed upon it by the California courts might be said to be enacted with the statute.' The same principle is announced in *Lindley v. Davis*, 6 Mont. 453; *Stackpole v. Hallahan*, 16 Mont. 40; *Murray v. Heinze*, 17 Mont. 353; *State v. O'Brien*, 18 Mont. 1; *State v. Butte City Water Co.*, 18 Mont. 199; 56 Am. St. Rep. 574; and in *Largely v. Chapman*, 18 Mont. 563. . . . The provisions of section 54 of the Compiled Statutes were peculiar to three states—Minnesota, Oregon, and Montana. In *Partlow v. Singer*, 2 Or. 307, and *Sutherland v. Roberts*, 4 Or. 378, a statute of Oregon identical with section 54 of the Compiled Statutes received careful and thorough consideration, and was interpreted as in *Whitaker v. Rice*, 9 Minn. 13, 86 Am. Dec. 78. The supreme court of the United States in *Cross v. Allen*, 141 U. S. 528, treated the subject upon principle, and with reference to the Oregon statute, but without relying upon the judicial construction of the law by the courts of that state, and held to the Minnesota interpretation. The reasons advanced by these courts are cogent, and, to my mind, unanswerable. It seems to me that this court has, in the *Bullard* case and the one at bar, practically eliminated section 54 of the Compiled Statutes from the statutes, by refusing to give effect to its clear language and unmistakable import. I am satisfied that section 53 of the Compiled Statutes was intended for one purpose, and that section 54 was designed for another and different purpose. If the majority opinion be correct, I cannot conceive why section 54 of the Compiled Statutes was enacted, since section 53 is, in the opinion of the court, ample for all the ends intended to be attained by the other section.

"*Stare decisis* ought not to be applied, for the error may be now corrected without injury or hardship, it being apparent that, since the decision in the *Bullard* case, no rights can have arisen in favor of makers of promissory notes which could be affected by overruling the doctrine there announced. The privilege of defeating a just debt by interposing the defense of the statute of limitations is not a vested right: *Campbell v. Holt*, 115 U. S. 620. For these reasons, I think the judgment should be affirmed."

#### LIMITATIONS OF ACTIONS—NEGOTIABLE INSTRUMENTS.

A payment by one joint debtor or an extension of time procured by him, without the knowledge, assent, or subsequent ratification by the other, does not stop the running of the statute of limita-

tions as to the latter. Hence, such acts, by one joint debtor on a promissory note, will not keep the note alive against his codebtor: *Boynton v. Spafford*, 162 Ill. 113; 53 Am. St. Rep. 274, and note, showing the conflict of authority upon this question. In accord with the principal case are: *Powers v. Southgate*, 15 Vt. 471; 40 Am. Dec. 691; *Campbell v. Brown*, 86 N. C. 376; 41 Am. Rep. 464; *Bush v. Stowell*, 71 Pa. St. 208; 10 Am. Rep. 694; monographic note to *Beitz v. Fuller*, 10 Am. Dec. 697. Contra, *Austin v. Bostwick*, 9 Conn. 496; 25 Am. Dec. 42; *Colt v. Tracy*, 8 Conn. 268; 20 Am. Dec. 110.

**STATUTES ADOPTED FROM ANOTHER STATE—CONSTRUCTION.**—If a clause is taken from the constitution or statute of another state it is deemed to have the meaning given by the courts of that state: *Laporte v. Gamewell etc. Tel. Co.*, 146 Ind. 466; 58 Am. St. Rep. 359, and note; *State v. Chandler*, 132 Mo. 155; 53 Am. St. Rep. 483; yet such interpretation can never amount to more than persuasive authority as to the true intent and meaning of the statute, and the proper application of its terms; or be permitted to prevail against the general policy of the laws and the practice of the country of its adoption: *Pratt v. Miller*, 109 Mo. 78; 32 Am. St. Rep. 656, and note.

**NEGOTIABLE INSTRUMENTS—LIMITATIONS OF ACTIONS.** It is generally held that where a note is payable upon demand, the statute of limitations runs from its date, and not from actual demand: *Wenman v. Mohawk Ins. Co.*, 13 Wend. 267; 28 Am. Dec. 464, and note; *Smith v. Bythewood, Rice*, 245; 33 Am. Dec. 111. This is true as to a note whereon a right of action accrues without demand: *Kraft v. Thomas*, 123 Ind. 513; 18 Am. St. Rep. 345, and note; although it is held that the statute does not begin to run against an indorsee of a promissory note, payable on demand, until the expiration of a reasonable time after he receives the note: *Mudd v. Harper*, 1 Md. 110; 54 Am. Dec. 644.

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## SHARMAN v. HUOT.

[20 MONTANA, 555.]

**ATTACHMENT—TIME OF ISSUANCE OF WRIT.**—A writ of attachment issued before the summons is not merely voidable, but void, under a statute providing that "the plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached."

**SUMMONS—SIGNATURE OF CLERK.**—A statute providing that summons must be "signed by the clerk and issued under the seal of the court" is mandatory, and to render a summons valid, it must be signed by the clerk. His signature is a matter of substance and a fundamental part of the summons.

**WRITS—AMENDMENT OF.**—A void jurisdictional writ or process cannot be amended.

**APPELLATE PRACTICE—APPEAL FROM ORDER.**—An order amending a summons is no part of the record on an appeal from a prior order discharging an attachment, and cannot be reviewed by the appellate court.

Hartman Brothers & Stewart, for the appellant.

Luce & Luce, for the respondents.



**556** PIGOTT, J. These are appeals from two separate orders discharging a writ of attachment.

From the transcript in No. 1068 it appears that the plaintiff filed her complaint on February 25, 1897, and that the sheriff thereupon received a certain paper, which gave the title of the cause and the style of the action, and proceeded thus:

"The state of Montana to the above-named defendant: You are hereby summoned to answer the complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and, in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

"Witness my hand and the seal of said court, this 25th day of February, 1897.

"[Seal of Court]

\_\_\_\_\_,  
"Clerk."

The clerk then issued a writ of attachment against the defendant, and the sheriff, on February 26th, delivered to the defendant a copy of the foregoing supposed summons, and also delivered to him a copy of the complaint. On the same day, the sheriff executed the writ of attachment upon the property of the defendant. On March 4th, the defendant, appearing specially, moved the court to discharge the writ of attachment on the ground that the issuance of a summons had not accompanied or preceded the writ. The court discharged the writ, and dissolved the attachment. From this order, the plaintiff appeals.

In No. 1076 it appears that the intervenor, Eukes, on March 1, 1897, commenced an action against defendant, and that the sheriff executed a writ of attachment, issued in that **557** case upon the same property seized by him in Sharman against Huot. Eukes moved the discharge of the writ, and a dissolution of the attachment in the Sharman case, upon the grounds stated in defendant's motion for the same purpose in that case. The court granted the motion of Eukes, and plaintiff again appeals.

We are of the opinion that the district court properly discharged the writ of attachment.

Section 890 of the Code of Civil Procedure provides that "the plaintiff at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered." This statute was adopted from California, and the

interpretation it bore in that state when adopted is controlling. In *Low v. Henry*, 9 Cal. 552, the court held that a writ of attachment issued before the issuance of a summons is void, and that the subsequent issuance of the summons cannot give effect to that which was void from the beginning. Moreover, we think there can be no doubt upon principle that a writ of attachment issued before the summons is, under the statute, not voidable merely, but void.

Summons was not issued. The law, by section 632 of the Code of Civil Procedure, prescribes the requisites of a summons. It reads: "The summons must be directed to the defendant, signed by the clerk, and issued under the seal of the court and must contain: The names of the parties to the action, the court in which it is brought, and the county in which the complaint is filed, and must be substantially as follows," etc. The language is mandatory: *Dyas v. Keaton*, 3 Mont. 495; *Sawyer v. Robertson*, 11 Mont. 416; *Lyman v. Milton*, 44 Cal. 630; *Black v. Clendenin*, 3 Mont. 47; *Gray v. Hawes*, 8 Cal. 563; *Smith v. Aurich*, 6 Colo. 388.

The summons must be signed by the clerk. His signature is a matter of substance. It is a fundamental part of the summons. Without it there is no summons.

In *Sidwell v. Schumacher*, 99 Ill. 433, the court said: 558 "While there is some conflict of authority upon this subject, yet it is believed that the weight of the authority establishes the proposition that where the law expressly directs that process shall be in a specified form, and issued in a particular manner, such a provision is mandatory, and a failure on the part of the official, whose duty it is to issue it, to comply with the law in that respect, will render such process void."

In *Hernandez v. Drake*, 81 Ill. 38, it is said: "The 40th section of the chapter entitled 'Courts' (Rev. Stats. 1845, p. 147) provides that the clerks of the circuit courts may issue process in all cases arising therein, which shall bear teste in the name of and be signed by such clerks, respectively, and be dated on the days on which they issue, and be made returnable, according to law. That the writ must be signed by the clerk is made indispensable by this enactment."

In *Riggs v. Bagley*, 2 G. Greene, 383, the supreme court of Iowa, in the course of an opinion holding that a certain writ was properly quashed, said: "It is true, as is urged, that the seal of the district court proves itself; but it does not of itself prove that it was affixed by the proper officer, or by his

authority. The clerk is the keeper of the seal. He alone is authorized to use it; and, upon affixing the seal officially in any process, he should attest the fact over his signature."

We cite the following cases as being either directly in point or lending support to principles upon which these views are based: Choate v. Spencer, 13 Mont. 127; 40 Am. St. Rep. 425; Wimbish v. Wofford, 33 Tex. 109; Andrus v. Carroll, 35 Vt. 102; Gardner v. Lane, 3 Dev. 53; Pendleton v. Smith, 1 W. Va. 16; Laidley v. Bright, 17 W. Va. 779; Hutchins v. Edson, 1 N. H. 139; Reynolds v. Damrell, 19 N. H. 397; Wiley v. Bennett, 9 Baxt. 581; Smith v. Affanassieffe, 2 Rich. 334; Chapin v. Allison, 15 Ohio, 566; Tibbetts v. Shaw, 19 Me. 204; Reeder v. Murray, 3 Ark. 450; Stayton v. Newcomer, 6 Ark. 451; 44 Am. Dec. 524; Wheaton v. Thompson, 20 Minn. 196; Anderson v. Joliett, 14 La. Ann. 624; Dexter v. Cochran, 17 Kan. 447; <sup>559</sup> In re Farr, 41 Kan. 276; Pelham v. Edwards, 45 Kan. 547; Greenleaf v. Mumford, 30 How. Pr. 30; Smith v. Hackley, 44 Mo. App. 614; United States v. Rose, 14 Fed. Rep. 681; Ripley v. Warren, 2 Pick. 592. The signature of the clerk and the seal of the court are the testimonials by which the authenticity of the summons is made to appear: Shepherd v. Lane, 2 Dev. 148.

It is insisted, however, that the summons in question may be amended. Section 774 of the Code of Civil Procedure does not confer power upon the court to amend a void jurisdictional writ or process. Here the supposed summons was defective in a material part, and hence it is not amendable: United States v. Rose, 14 Fed. Rep. 681; Choate v. Spencer, 13 Mont. 127; 40 Am. St. Rep. 425. There must be a process to be amended—something to amend and amend by: United States v. Turner, 50 Fed. Rep. 734; Witherell v. Randall, 30 Me. 168; Joiner v. Delta Bank, 71 Miss. 382. The rule applicable to a statute even more liberal with respect to amendments than is section 774 of the Code of Civil Procedure, is clearly stated by the supreme court of Wisconsin in Whitney v. Brunette, 15 Wis. 68, as follows: "It is true, the statute of amendments then in force was very broad and liberal. It provided that the court in which any action was pending might 'amend any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice,' etc. But I think this relates only to such defects as do not render the process absolutely void. There must be something to amend, and a void writ is a nullity. To amend in such a case would be to create



the writ anew, giving it a retroactive effect: *Bunn v. Thomas*, 2 Johns. 190; *Burk v. Barnard*, 4 Johns. 309; *Bell v. Austin*, 13 Pick. 90; *Cramer v. Van Alstyne*, 9 Johns. 386; *Chandler v. Brecknell*, 4 Cow. 49; *Kyles v. Ford*, 2 Rand. 4. . . . A still further answer is that, if a void writ can be helped at all by amendment, it should only be allowed that effect as between the parties to the proceeding, and not so as to cut off intermediate rights acquired by third parties: *Witte v. Meyer*, 11 Wis. 300, and cases cited." We approve the doctrine there announced.

<sup>560</sup> The transcripts disclose that the court discharged the writ of attachment, and then sustained appellant's motion to amend the summons. Appellant contends that the decision on the motion last mentioned is the law of the case, and controlling. We are of a contrary opinion. The appeals are from the orders discharging the writ. The order granting leave to amend the summons, while included in the transcript, is not one of the papers required by section 1737 of the Code of Civil Procedure, to be certified to this court, and is therefore no part of the record on appeal. It is not before us.

The orders appealed from are affirmed.

Pemberton, C. J., and Hunt, J., concurs.

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**ATTACHMENT—ISSUANCE OF BEFORE SUMMONS.**—Under a statute allowing the plaintiff "at the time of issuing the summons, or at any time afterward," to have the property of the defendant attached, the summons must be issued at the time of, or prior to, the issuance of the writ of attachment. If the writ is issued before the summons, it is void: *White v. Johnson*, 27 Or. 282; 50 Am. St. Rep. 726, and note.

**PROCESS—JURISDICTIONAL DEFECTS IN.**—A writ, issued from a court having a seal, is void, unless attested thereby: *Choate v. Spencer*, 13 Mont. 127; 40 Am. St. Rep. 425, and extended note on jurisdictional defects in process: See *Parker v. Barker*, 43 N. H. 35; 80 Am. Dec. 130.

**PROCESS—AMENDMENT OF.**—All voidable process can be made perfect by proper amendment, but void process cannot be: *Durham v. Heaton*, 28 Ill. 264; 81 Am. Dec. 275. The true test of void process occasioned by an irregularity, is that the irregularity must be in the process itself or in the mode of issuing it: *Byers v. Fowler*, 12 Ark. 218; 54 Am. Dec. 271. See *Bank of Missouri v. Matson*, 26 Mo. 243; 72 Am. Dec. 208; *Woodcock v. Bennet*, 1 Cow. 711; 13 Am. Dec. 568.

**CASES**  
**IN THE**  
**COURT OF APPEALS**  
**OF**  
**NEW YORK.**

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**ATHERTON v. ATHERTON.**

[155 New York, 129.]

**DIVORCES GRANTED IN ANOTHER STATE.**—A divorce entered in another state against a resident of the state of New York in a suit in which the defendant did not appear, in which process was not served on her within the state wherein the decree was rendered, is void as against her in New York, though the plaintiff was, and always had been, a resident of the state in which he so procured his divorce, and the defendant was also a resident of that state during the time she lived with him as his wife, she having, however, returned to, and become a resident of, New York before the suit for divorce was commenced.

**HUSBAND AND WIFE—DOMICILE OF THE WIFE IS NOT NECESSARILY THAT OF THE HUSBAND.**—The matrimonial domicile of the wife is usually that of the husband, but if she is justified in leaving him because his conduct has been such as to entitle her to a divorce, and she thereupon does leave him and go into another state for the purpose of there permanently residing, she acquires a domicile in the latter state.

**THE JURISDICTION OF A COURT OF ANOTHER STATE** in which a judgment has been entered is always open to inquiry in the courts of this state, and if the court has exceeded its jurisdiction, or has not obtained jurisdiction of the parties, the proceedings are void.

**A DECREE OF DIVORCE GRANTED AGAINST A WIFE** in a state of which she was not a resident at the time of the commencement of the suit, and when she was not served with process in the state, and did not submit herself to the jurisdiction of its courts, cannot prevent her from prosecuting with success, in the courts of this state, a suit against her husband to obtain a divorce from him because of his cruel and inhuman treatment of her.

**HUSBAND AND WIFE — AGREEMENT BETWEEN, WHEN SET ASIDE BY SUBSEQUENT PROCEEDINGS.**—An agreement between a husband and wife recognizing the fact that they had ceased to live together, providing for the custody of their child and the amount he is to pay for its and her support, and that

divorce, or second marriage of either party is to terminate it, must be regarded as mutually abandoned by the parties when each has prosecuted a suit against the other for divorce; and the court is therefore authorized, in a suit by her against him, to make such decree as may be deemed proper respecting alimony and the custody of the child.

Alex. P. Humphrey and Simon W. Rosendale, for the appellant.

William Kernan and A. M. Mills, for the respondent.

**132** BARTLETT, J. The defendant seeks on this appeal the reversal of a judgment for limited divorce recovered against him by his wife.

The judgment rests upon the finding of the trial court that the defendant had treated the plaintiff in such a cruel and inhuman manner that it rendered it unsafe and improper for her to cohabit with him and justified her in seeking a separate residence; it gives her alimony and the custody of the only child of the marriage.

The plaintiff, a young lady of refinement and excellent social position, was married, when twenty-two years old, to the defendant at her father's house in Clinton, New York, on the seventeenth day of October, 1888. The defendant is a young man of good family, a native of Kentucky, and at the time of his marriage resided with his parents at the city of Louisville. After the wedding trip the plaintiff and defendant took up their residence at the house of defendant's parents. On the 8th of January, 1890, a daughter was born, and is the only issue of the marriage.

On the 3d of October, 1891, the plaintiff left her husband's house permanently, taking the child with her. On the tenth day of October, 1891, and before her departure for the state of New York, the plaintiff, her trustee, and the defendant, with the advice of counsel, entered into a certain agreement that will be referred to later. Immediately thereafter the plaintiff departed from the commonwealth of Kentucky and came to the state of New York with the intention, as the trial court finds, of changing her residence and domicile from Kentucky to New York.

In the month of December, 1892, the defendant commenced an action against plaintiff in Kentucky for an absolute divorce, alleging that she had abandoned him in the month of October, 1891, without fault on his part, and such abandonment had continued uninterruptedly for the period of more than one year.



Under the statutes of Kentucky the proof of this state of facts entitles a plaintiff to a decree dissolving the bonds of <sup>133</sup> matrimony. The defendant was not served with process in Kentucky nor did she appear in the action.

The decree of divorce was obtained upon the assumption that the defendant was a resident of Kentucky who had been absent therefrom for four months, and could, therefore, receive notice of commencement and pendency of the action by a designated constructive process.

The plaintiff made his formal proofs, and in the absence of the defendant the Kentucky decree was entered about March 14, 1893.

The wife began the present action for a limited divorce on the ground of cruel and inhuman treatment in January, 1893, and the trial court rendered judgment in her favor in June, 1893. The husband appeared in this case, was represented by able Kentucky and New York counsel, and the issues were thoroughly tried.

The principal question presented by this appeal is whether the Kentucky decree is a bar to this action, the defendant having set it up in his answer. The plaintiff attacked this decree on the ground that it was entered by a court having no jurisdiction of her person, she being at the time the Kentucky action was begun and the decree therein entered, a resident of the state of New York.

On the other hand, the defendant insisted that his wife was at the time referred to a resident of Kentucky and consequently bound by the decree. This was one of the issues tried and decided in favor of the wife.

The learned counsel for the defendant from Kentucky argued with great earnestness and ability that the matrimonial domicile of the wife is that of her husband, and consequently we are compelled by the constitution of the United States to give full faith and credit to the decree in her husband's favor: Const., art. 4, sec. 1. In view of the fact that we have a finding fixing the wife's domicile in this state, we are of opinion the Kentucky decree is void as to her under the law as well settled in this jurisdiction.

It is undoubtedly true that the matrimonial domicile of the <sup>134</sup> wife is that of her husband, but this general rule has its exceptions.

In this case we have the finding that the plaintiff was justi-

fied in leaving her husband, and that her sole reason for so doing was his cruel and inhuman treatment.

This court said in *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129, in speaking of the general rule as to the wife's domicile, at page 242: "There are, however, exceptions to the rule, one of which is invoked by the plaintiff in this suit, so that in certain cases a married woman may have a domicile in another jurisdiction than that of her husband. This is so, when they are living apart under a judicial decree of separation, or when the conduct of the husband has been such as to entitle the wife to an absolute or limited divorce. She may acquire a separate domicile whenever it is necessary for her to do so. But the right to do so springs from the necessity for its exercise."

In the case at bar we have the undoubted right of the plaintiff to change her domicile under this rule, followed up by the finding that she did so change it to the state of New York.

It has been held in many cases that the jurisdiction of the court of another state in which judgment has been rendered, is always open to inquiry in the courts of this state; and if that court has exceeded its jurisdiction, or has not obtained jurisdiction of the parties, the proceedings are void: *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30; 7 Am. Rep. 299; *Hunt v. Hunt*, 72 N. Y. 217; 28 Am. Rep. 129; *People v. Baker*, 76 N. Y. 78; 32 Am. Rep. 274; *O'Dea v. O'Dea*, 101 N. Y. 23; *Jones v. Jones*, 108 N. Y. 415; 2 Am. St. Rep. 447; *De Meli v. De Meli*, 120 N. Y. 485; 17 Am. St. Rep. 652; *Rigney v. Rigney*, 127 N. Y. 408; 24 Am. St. Rep. 462; *Williams v. Williams*, 130 N. Y. 193; 27 Am. St. Rep. 517.

We have carefully examined the evidence and have reached the conclusion that the findings of the trial court as to the issues of domicile of the plaintiff and the cruel and inhuman treatment by defendant of his wife are not without evidence to support them, and because of their affirmance by the general term they are binding upon this court.

It, therefore, follows upon the facts and the law, that the Kentucky judgment is not a bar to this action.

<sup>135</sup> It remains for us to consider the appellant's points based on the alleged effect of the agreement entered into by the plaintiff, her trustee, and the defendant just prior to plaintiff's final departure from Kentucky.

This agreement bears date October 10, 1891. We do not regard this instrument as technically articles of separation between husband and wife, but rather an agreement to provide for

the best interests of the child, made in contemplation of the fact that the parents had separated and were to live in different jurisdictions.

The opening recitation of the agreement refers to the parties as "having ceased to live together as man and wife, without in any way acknowledging upon whom is the fault, or condoning the conduct of the one or the other which has led to the existing state of affairs, or preventing any consequences which may follow, or right which may arise to either party if such status shall continue." This language makes it clear that, while the separation was recognized as a fact, the agreement was not to prejudice or affect existing rights of either party growing out of that situation.

The recitation clause further states that the parties desire to provide for the best interests of the child, and with this view they have entered into the agreement. It provides for the alternating custody of the child by her mother and the mother of the defendant; the defendant obligates himself to pay five hundred dollars for maintenance of the child during that portion of the year in which she is with her mother; the wife is to receive alimony at the rate of one hundred and twenty-five dollars a month, the divorce or second marriage of either party to terminate the agreement; the agreement was to continue as to the child until she was fourteen years of age, and as to her mother until January 8, 1904; if divorce was granted, the provisions as to plaintiff were to be carried into the decree.

There are other details not necessary to mention. We are of opinion that the suit for absolute divorce brought by the husband in Kentucky in December, 1892, and the action for limited divorce instituted by the wife in this state in January, <sup>136</sup> 1893, both having proceeded to judgment, may be regarded as a mutual abandonment and termination of the agreement under its terms, and left the court below free to act as it deemed proper respecting the alimony of the wife and the custody and maintenance of the child. The provision of the agreement for the wife's alimony was not carried into the Kentucky decree, but the judgment in this action provides for the same amount of alimony per month of one hundred and twenty-five dollars.

It is unnecessary for us to consider any of the questions which are argued in the briefs, resting on the assumption that the agreement was in full force and effect at the time the judgment was entered herein at trial term. The husband and wife had sought relief in the courts, and the interests of the child



were safe, with the supreme court of this state guarding her rights.

The judgment of the general term should be affirmed, with costs.

All concur, except Gray, J., absent, and Martin, J., not sitting.

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**MARRIAGE AND DIVORCE—VALIDITY OF DIVORCE OBTAINED IN ANOTHER STATE.**—Jurisdiction of a court of record of another state of the subject of divorce, is a special authority not recognized by the common law, and its power must be shown and must appear to have been strictly pursued: *Kelley v. Kelley*, 161 Mass. 111; 42 Am. St. Rep. 389, and note. A divorce granted by such court without jurisdiction of the party against whom the decree is given, is entitled to no credit in the courts of a sister state: *Harding v. Alden*, 9 Me. 140; 23 Am. Dec. 549. See, as to the effect of a foreign divorce, the monographic note to *Tolen v. Tolen*, 21 Am. Dec. 747-752. For recent cases see *Loker v. Gerald*, 157 Mass. 42; 34 Am. St. Rep. 252; *Doerr v. Forsythe*, 50 Ohio St. 726; 40 Am. St. Rep. 703; *Harris v. Harris*, 115 N. C. 587; 44 Am. St. Rep. 471; *McCreery v. Davis*, 44 S. C. 195; 51 Am. St. Rep. 794, and notes thereto.

**MARRIAGE AND DIVORCE—DOMICILE OF WIFE.**—Generally the domicile of the wife is determined by that of the husband: *Jenness v. Jenness*, 24 Ind. 355; 87 Am. Dec. 335. This is so when her separation from him is without justifiable cause: *Loker v. Gerald*, 157 Mass. 42; 34 Am. St. Rep. 252, and note. But they may have different domiciles under the law regulating divorces where the husband has forfeited his rights by misbehavior and desertion of his wife: *Harding v. Alden*, 9 Me. 140; 23 Am. Dec. 549; *Jenness v. Jenness*, 24 Ind. 355; 87 Am. Dec. 335.

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## PIKE v. HONSINGER.

[155 NEW YORK, 201.]

**A PHYSICIAN AND SURGEON BY TAKING CHARGE OF A CASE IMPLIEDLY REPRESENTS** that he possesses, and the law places upon him the duty of possessing and exercising, that reasonable degree of learning and skill ordinarily possessed by physicians and surgeons in the locality where he practices, and which is ordinarily regarded as necessary to qualify him to engage in the business of practicing medicine and surgery.

**A PHYSICIAN AND SURGEON IS LIABLE TO HIS PATIENTS** for any injury resulting from want of the knowledge and skill ordinarily possessed by persons of his profession in the locality, and for a failure to use his best judgment or to exercise reasonable care.

**A PHYSICIAN AND SURGEON IS NOT REQUIRED TO POSSESS THAT EXTRAORDINARY LEARNING AND SKILL** which belong only to a few men of rare attainments, but such as is possessed by the average member of the medical profession in good standing. He is, however, required to keep abreast of the times, and his departure from approved methods in general use,

if it injures his patient, renders him liable, however good his intentions may have been.

**PHYSICIAN AND SURGEON, DUTY OF, TO WHAT EXTENDS.**—The duty of a surgeon, and his liability for not exercising reasonable care, extend not only to diagnosis and treatment, but also to giving all proper instructions to his patient in relation to conduct, exercise, and the use of an injured limb, in the event of his being called to treat an injury of that character.

**PHYSICIANS AND SURGEONS—ERRORS OF JUDGMENT, LIABILITY FOR.**—The rule requiring a physician and surgeon to use his best judgment does not hold him answerable for a mere error of judgment, provided he does what he thinks best after a careful examination.

**A PHYSICIAN OR SURGEON DOES NOT GUARANTEE** that his treatment of a patient shall produce a good result, but does guarantee that he will use the skill and learning of the average physician or surgeon, and will exercise reasonable care, and give his best judgment, in an effort to bring about a good result.

Thomas F. Conway, for the appellant.

Royal Corbin, for the respondent.

**204 VANN, J.** As the case was not submitted to the jury we must assume, on this review, that if they had been allowed to exercise their judgment they would have found all the facts in favor of the plaintiff that any reasonable view of the evidence would permit. Upon this basis the facts may be stated as follows: On the 2d of May, 1888, the plaintiff, then forty-four years of age, with good health and sound limbs, had the patella or kneecap of his right leg broken by the kick of a horse. When the accident happened he was five miles from home and two and one-half miles from the village where the defendant, a physician and surgeon, resided. He drove to the office of the defendant, who was absent, but the father of the defendant, who was also a physician and surgeon, was there and treated the injury by applying on each side a strip of adhesive plaster twelve or fifteen inches long to the calf of the leg, and running it over the knee to the side of the thigh. The leg was then bandaged, a splint eighteen inches long put on, another bandage wrapped over all, and thereupon the plaintiff walked to his wagon and rode home over a rough road. He noticed on the way that the bandage and splint had become loose, and on reaching home, with the aid of his wife, he tightened them as well as he could. The leg received no further treatment, nor did the defendant see it until May 8th, six days after the accident, when he came to plaintiff's house in response to a message requesting him to call. He was told how his father had treated the injury; that the plaintiff rode home in a buggy and walked into the house, and

that the bandage had come off and the splint had become loosened. At this time, when the defendant took charge of the case, the leg was so swollen at the knee that it was as large as the thigh, even when covered with clothing. He took off the bandages and splint, examined the injury, pronounced it a rupture of the ligaments, and told the plaintiff that he would have to lie in bed perfectly quiet <sup>205</sup> until they were united, which might take six or eight weeks. The bandages and splint were off about half an hour with nothing in their place, and during this time he measured both legs with a tape and rule and there was a difference of one-half inch between the two. When the rule was put across from one knee to the other it was not straight, but "higher up" on the injured than on the sound leg. After washing the parts he put the bandages and splint on "about the same as his father had," not in the shape of a figure "8," nor by attaching the bandages to the splint at either end, nor were any means used to keep the leg steady below the splint. After placing some cushions on a board at the foot of the bed, and placing the foot on them, he went away saying he would come again and bring a longer and better splint. He returned after an interval of three days, took off the short splint and the bandages and left them off while treating the leg for from twenty minutes to half an hour. He bathed the leg in warm water, restored the bandages and put on a long splint, which reached farther up the leg than the other and clear down to the heel, where the other bandage was wrapped around the foot and fastened. The leg was still swollen and **nothing was done** to reduce the swelling on any of the visits except as stated. He made five visits in all, two during the first week, and the others on the 26th and 30th of May and the 7th of June, and at the latter date he took off the long splint and put on the short one again. On the day last named, or about five weeks after the accident, in response to questions put by the plaintiff, who was an assessor, the defendant told him he could go out assessing, but must be careful and not hurt the leg, saying that if he was thrown out of the wagon, or was injured in any way by his own negligence, he did not want to be responsible for it. He also told the plaintiff that he could walk around the house with the short splint on. The plaintiff did walk about the house a little, and in a few days began to attend to his business as assessor, being out two or three days in a buggy. He testified that his leg was not injured during this <sup>206</sup> time, and that while in the wagon his heel rested on some boards attached to the dashboard



and arranged for the purpose. The roads were rough and jolted a good deal and the defendant was familiar with their condition, as he traveled them frequently. During none of this time did he make any effort to bring the separated parts of the patella together, and the adhesive plasters, which the old doctor had applied, were left on until the 15th of June, when the plaintiff called at the defendant's office, pursuant to his direction, for further treatment. The defendant then took the plasters off, put his hand under the leg and tried to bend it, but used no means to keep the parts of the patella together as he did so. He washed the leg, which was still swollen, and put the short splint on again, saying that a ligamentous union had begun. While treating it on this occasion there was nothing whatever on the leg. He gave the plaintiff some liniment to use, told him to work and bend the leg and showed him how to put the splint and bandage on, but gave no directions to keep the parts of the patella together while working the leg, and after that visit the only thing put on was the short splint and bandage. When the plaintiff told him he had been out assessing the defendant did not object, but said that the leg was doing well. The following Saturday the plaintiff called at the office again and his leg was treated as it had been before. The defendant took the leg across his knee and tried to work it, and said if it did not loosen up he would put the plaintiff under the influence of ether and "break the damn thing down." He also told the plaintiff to use some skunk's oil, if he could get it, and he did so, and after that the knee "began to loosen up some" and the upper part of the patella "began to slip up some." About the 15th of July the plaintiff told the defendant that his leg was not set right as there was a space between the parts of the patella, but the latter read from a work on surgery to assure him that it was all right. In August he asked the defendant if it would hurt him to do a little haying, and was told that it would not if he was careful, any more than to walk around, and accordingly he rode on the mowing machine for <sup>207</sup> a few days, but was careful not to hurt his leg. He went to the office every week from the 15th of June until in September, when the splint was taken off by the defendant, who said the leg was doing well every time he saw it. About the 1st of March the plaintiff learned casually from another physician that the injury was a fracture of the patella, and soon after told the defendant, as he had insisted the summer before, that the leg was not set right. He made an examination and admitted that the knee cap was broken, although up to this time he

had pronounced the injury a rupture of the ligaments, and had continuously declared that there was a good ligamentous union. A little later in the spring he informed the plaintiff that "the leg was not worth a damn, and he would have to go into something else besides farming." At the time of the trial the plaintiff testified that the leg hurt him very much in driving, and that he could not walk on rough ground without his ankle turning over, that he could do but little on his farm and could not plow, drag, or walk on plowed ground to any extent; that he was unable to lift half as much as he could before the accident, and not at all unless he stood straight, although before that he was accustomed to do all kinds of farm work; that he could not hold his leg up, and was informed by physicians that there was no ligamentous union; that he relied on the defendant's statement that his leg was getting along all right, and that he would have a good leg, and did not get another physician for that reason.

Expert evidence was given tending to show that while a fracture of the patella is not common, a rupture of the ligaments connected therewith is very uncommon; that a powerful muscle extends from the lower portion of the patella to the bone below and serves to hold it in place from that direction, while on the upper side another muscle of great strength keeps it in place and controls its action from that direction; that these muscles cannot be controlled by strips of adhesive plaster in case the leg is flexed; that in treating an injury it is necessary to first know what the trouble is, and to reduce the swelling for that purpose; that while the parts of a broken patella <sup>208</sup> might be brought together if there was some swelling, it would be difficult to do so if the knee was swollen so that it was as large as the thigh, and that it would be very difficult, under those circumstances, to know whether the parts had been brought together or not; that in the case of a fractured patella it is important that the broken parts should be placed and kept in apposition, and that the patient should be kept perfectly quiet for eight or ten weeks until strong ligamentous union takes place, and the leg used very carefully afterward for a sufficient length of time to enable the ligaments to get strong enough not to rupture; that a splint should be put on as soon as possible and kept on for some time without being changed, so as to prevent separation of the bony parts; that it should be kept on even when the surgeon makes examinations, which should be frequent, in order to see whether reparation has occurred; that flexing the limb should not be resorted to for eight or ten

weeks, and when resorted to the patella should be supported from both directions by using pressure on both the upper and lower portions; that the splint should be kept on for about a year—a long splint for two or three months, and after that a short splint; that it would not be possible, with a splint extending from the center of the thigh to the middle of the leg, to keep the limb quiet so as not to have muscular action, as the patient moves about in bed even while asleep; that if obliged to use a short splint at first, a long one should be obtained and applied as soon as possible; that the patient should not be permitted to work or use his limb much for a year, and not to do very active work for a year and a half; that it would not be in accordance with the usual practice to permit a man with such a fracture, occurring in the fore part of May, to assist in haying and harvesting that season, with a short splint on about eighteen inches long, and that it would be extremely hazardous to allow him to ride over rough roads in a buggy along in June, as the probable result would be to break up what adhesion had taken place and leave the leg as though there had been no treatment whatever; that it is not the usual practice, after putting on a <sup>209</sup> long splint, to take it off with the bandages every week and leave the patella and leg without any support except an adhesive plaster, as this could not be safely done until two or three weeks after treatment was commenced, and that then there should be pressure when the bandages were removed; that the fractured parts of the plaintiff's patella at the time of the trial were about two and one-half inches apart when the leg was flexed, and, when extended, about one and one-half inches; that there is neither bony union nor ligamentous union, and that the result is bad, although in a large majority of such cases, by proper treatment, a good result is obtained.

While there was much conflict in the evidence, both in relation to the treatment actually pursued, and as to the treatment that should have been pursued, it was within the province of the jury to settle the conflict by finding the facts as thus stated. Could they, from those facts, have drawn the inference of negligence, resulting injury, and liability therefor?

The law relating to malpractice is simple and well settled, although not always easy of application. A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he



practices, and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine and surgery. Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge. The law holds him liable for an injury to his patient resulting from want of the requisite knowledge and skill, or the omission to exercise reasonable care, or the failure to use his best judgment. The rule in relation to learning and skill does not require the surgeon to possess that extraordinary learning and skill which belong only to a few men of rare <sup>210</sup> endowments, but such as is possessed by the average member of the medical profession in good standing. Still, he is bound to keep abreast of the times, and a departure from approved methods in general use, if it injures the patient, will render him liable, however good his intentions may have been. The rule of reasonable care and diligence does not require the exercise of the highest possible degree of care, and to render a physician and surgeon liable, it is not enough that there has been a less degree of care than some other medical man might have shown, or less than even he himself might have bestowed, but there must be a want of ordinary and reasonable care, leading to a bad result. This includes not only the diagnosis and treatment, but also the giving of proper instructions to his patient in relation to conduct, exercise, and the use of an injured limb. The rule requiring him to use his best judgment does not hold him liable for a mere error of judgment, provided he does what he thinks is best after careful examination. His implied engagement with his patient does not guarantee a good result, but he promises by implication to use the skill and learning of the average physician, to exercise reasonable care, and to exert his best judgment in the effort to bring about a good result: *Carpenter v. Blake*, 75 N. Y. 12; 10 Hun, 358; 50 N. Y. 696; 60 Barb. 488; *Link v. Sheldon*, 136 N. Y. 1; *Patten v. Wiggin*, 51 Me. 594; 81 Am. Dec. 593; *Hitchcock v. Burgett*, 38 Mich. 501; *Smothers v. Hanks*, 34 Iowa, 286; 11 Am. Rep. 141; *McCandless v. McWha*, 22 Pa. St. 261; 14 Am. & Eng. Ency. of Law, 76.

Having thus stated the nature of the injury and the condition of the plaintiff when the defendant took charge of him, the treatment actually pursued and the treatment that should

have been pursued, as the jury might have found, as well as the general principles of law applicable to such cases, we think it follows that the learned trial judge should have submitted the case to the jury. While they might have found for the defendant if they believed him and his witnesses; if, on the other hand, they believed the plaintiff and his witnesses, they might have found that the defendant was guilty of negligence <sup>211</sup> in omitting to reduce the swelling so that a safe diagnosis could be made; in failing to discover that the real nature of the injury was a broken patella instead of a rupture of the ligaments; in omitting to place the broken parts in apposition, and to keep them there with proper appliances, and by taking proper precautions as to quiet for a sufficient length of time to bring about the best result; in dressing and flexing the leg without adequate care to keep the broken bones together, and in telling the plaintiff to flex it, without proper instructions to that end; in permitting the plaintiff to use his leg too soon and in a hazardous manner, and in assuring him that his knee was getting along all right and that he would have a good leg, and thereby preventing him from securing other medical treatment. They might also have found that such negligence injured the plaintiff by preventing a better recovery, which would lead to an assessment of damages.

We think there were questions of fact for the determination of the jury, and that, for the error in directing a verdict, the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except Bartlett, J., dissenting, and Gray, J., absent.

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**PHYSICIANS AND SURGEONS—CARE AND SKILL REQUIRED OF—LIABILITY.**—A surgeon employed professionally to treat an injury is bound to use in his treatment a reasonable, ordinary degree of care and skill of the profession in his community, but he does not undertake to use the highest degree of care or skill, nor, in the absence of a special agreement, to perform a cure: *Lawson v. Conaway*, 37 W. Va. 159; 38 Am. St. Rep. 17, and note; *Force v. Gregory*, 63 Conn. 167; 38 Am. St. Rep. 371, and note. A physician or surgeon does not warrant a cure, and is not responsible for failure, unless it results from negligence or want of skill such as he is required to possess and exercise: *Patten v. Wiggin*, 51 Me. 594; 81 Am. Dec. 593, and note. Nor does a failure to effect a cure raise a presumption of want of proper skill or diligence: *Lawson v. Conaway*, 37 W. Va. 159; 38 Am. St. Rep. 17. See *Howard v. Grover*, 28 Me. 97; 48 Am. Dec. 478, and monographic note. But he is liable for damages arising as well from want of skill, as from the want of application of skill: *Long v. Morrison*, 14 Ind. 595; 77 Am. Dec. 72; *Du Bois v. Decker*, 130 N. Y. 325; 27 Am. St. Rep. 529, and notes.

## PARK v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[155 NEW YORK, 215.]

**MASTER AND SERVANT—INJURY TO ONE SERVANT FROM THE NEGLIGENCE OF ANOTHER.**—A master is not liable to his servant for injuries resulting from the negligence of a fellow-servant, unless the latter was incompetent and unfit for the service, and this was known, or should have been known, to the master.

**MASTER AND SERVANT—INCOMPETENCY OF FELLOW-SERVANT—GENERAL REPUTATION AS EVIDENCE OF.** Where it is claimed that a fellow-servant, through whose negligence the plaintiff received injury, was incompetent and unfit for the duties he undertook to perform, such incompetency and unfitness cannot be proved by evidence of his general reputation. His incompetency must be shown by specific acts of the servant, and it must further appear, to fasten liability on the master, that he knew, or ought to have known, thereof. This knowledge may be shown by evidence tending to establish that such incompetency was generally known in the community.

**MASTER AND SERVANT, EVIDENCE TO ESTABLISH THE INCOMPETENCY OF A FELLOW-SERVANT.**—Evidence that some eight or ten years prior to the accident in which plaintiff was injured, as he claimed, through the negligence of an incompetent fellow-servant, that such fellow-servant was called "Crazy Brown," is incompetent and prejudicial.

Frank Hiscock, for the appellant.

Louis Marshall, for the respondent.

**217** **HAIGHT, J.** This action was brought by the plaintiff, who was an engineer in the employ of the defendant, to recover for injuries sustained by reason of the collision with a freight train, caused by the negligence of one Brown, a brakeman in the employ of the defendant.

The freight train on the evening of November 21, 1891, had been switched from its regular track to the east-bound passenger track near Canastota, and had proceeded eastward a little over a mile from that station when it became stalled and the train broke in two, leaving the rear portion of the train stationary at a point about eight hundred feet east of the end of a curve. Sanford Brown was the rear brakeman upon the train, and it then became his duty to go back upon the track and signal the approaching train so as to prevent a collision. The plaintiff was following upon the mail and express train, known as No. 32, and it is claimed that Brown neglected to go back a sufficient distance from his train to give the signals required to prevent a collision, and that owing to his neglect of duty in this regard,



a collision occurred in which the plaintiff suffered the injuries for which this action was brought.

Inasmuch as the plaintiff and Brown were coservants this action could not be maintained without showing that Brown was an incompetent man, unfit for the service in which he was engaged, and that such incompetency was known, or should have been known, by the officers of the defendant. It appears that he was thirty-five years of age and was born at Corinth, Saratoga county, in this state. That from early boyhood he had lived in the city of Schenectady and attended the union school at that place, and in 1881 entered the employ of the New York Central and Hudson River Railroad Company and ran upon a train as a brakeman, between West Albany and De Witt, for a period of about two years. After this he entered the employment of Saul & Davis, in Syracuse, hardware <sup>218</sup> merchants, for a time, and then again entered the employ of the New York Central and Hudson River Railroad Company under a Mr. White, the master mechanic at Syracuse. He served as an accountant and assistant bookkeeper for about three years and six months, after which he went to Louisville in the state of Kentucky, and entered the service of the Louisville & Nashville railroad as brakeman. He then became yard clerk, and after that service clerk and detective for the road. In 1890 he returned to this state, and again entered the employ of the defendant as extra conductor and served about seven months. He then returned to Louisville, and in August, 1891, returned to this state and was employed as a flagman, and continued in such employment down to the time of the accident.

The plaintiff, in order to establish his cause of action, gave considerable evidence with reference to the general reputation of Brown for carelessness, which was taken under the objection and exception of the defendant, which we shall not consider in detail. The character of this evidence has recently been under consideration in this court in the case of *Youngs v. New York etc. Ry. Co.*, 154 N. Y. 764. Inasmuch as there was no opinion written in that case we will briefly allude to the facts and the question decided. In that case, as in this, it became necessary to show that an employé was incompetent. This the plaintiff sought to do by showing his general reputation for carelessness from the speech of people. It was objected to by the defendant; the objection was sustained and an exception was taken by the plaintiff. The court then stated to the plaintiff's attorney, "I will allow you to show any specific acts of negligence on the

part of the engineer while engaged in the business of engineering, and I will allow you to show that those acts of carelessness were generally known in the community, and that the defendant had actual knowledge of such specific acts, or that they were so general that, upon proper inquiry, the defendant ought to have known." A nonsuit was granted, and the same was affirmed in the general term and in this court. We are aware that in <sup>219</sup> some states the courts have permitted incompetency of servants to be shown by general reputation, but we have never gone to that extent in this state. It appears to us that the safer and better rule is to require incompetency to be shown by the specific acts of the servant, and then, that the master knew or ought to have known of such incompetency. The latter may be shown by evidence tending to establish that such incompetency was generally known in the community: *Marrinan v. New York etc. R. R. Co.*, 13 App. Div. 439; *Baulec v. New York etc. R. R. Co.*, 59 N. Y. 356; *Monahan v. Worcester*, 150 Mass. 439; 15 Am. St. Rep. 226; *Gilman v. Eastern R. R. Co.*, 13 Allen, 433; 90 Am. Dec. 210; *Davis v. Detroit etc. R. R. Co.*, 20 Mich. 105; 4 Am. Rep. 364.

One Dean was sworn as a witness for the plaintiff, and testified that he knew Brown when he worked for the defendant at Schenectady. He testified that he had never heard his mental characteristics talked about and knew nothing of his mental reputation, but stated that he had heard of a handle to his name—a nickname. He was then asked to give his nickname. This was objected to; the objection was overruled and exception taken, and the witness answered that he was called "Crazy Brown"; this was eight or ten years before, and he had not heard him spoken of before this accident within the last ten years. We think that this evidence was prejudicial and incompetent, and, without considering the other numerous exceptions in the case, that a new trial should be granted.

The judgment should, therefore, be reversed and a new trial granted with costs to abide the event.

All concur, except Gray, J., absent, and Martin, J., not sitting.

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**MASTER AND SERVANT—INJURY OF SERVANT THROUGH INCOMPETENCY OF FELLOW-SERVANT—LIABILITY OF MASTER.**—A servant may recover damages for injury through the negligence of his fellow-servant, if the latter was unskilled and incompetent to discharge his duties, and this was known to the master, or could have been known to him by due care, and was not

known to the injured servant: *Campbell v. Cook*, 86 Tex. 630; 40 Am. St. Rep. 878, and note. A servant does not assume the risk of such injury: *Chicago etc. R. R. Co. v. Champion*, 9 Ind. App. 510; 53 Am. St. Rep. 357. A master is charged with knowledge of the general reputation of his servant for recklessness and unfitness for his position, when such reputation is generally and commonly known, and he has held such position for a number of years: *St. Louis etc. Ry. Co. v. Hackett*, 58 Ark. 381; 41 Am. St. Rep. 105, and note; *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38; 34 Am. St. Rep. 620, and note. As to the evidence necessary to enable the servant to recover for injury received through a fellow-servant, see *Western Stone Co. v. Whalen*, 151 Ill. 472; 42 Am. St. Rep. 244, and note; *Grube v. Missouri Pac. Ry. Co.*, 98 Mo. 330; 14 Am. St. Rep. 645; *Monahan v. Worcester*, 150 Mass. 439; 15 Am. St. Rep. 226.

## JEWELERS' MERCANTILE AGENCY v. JEWELERS' WEEKLY PUBLISHING COMPANY.

[155 NEW YORK, 241.]

**A COPYRIGHT AND THE COMMON-LAW RIGHT** of an author or publisher of a book cannot exist at the same time. The acquisition of the former terminates the latter.

**COPYRIGHT, PUBLICATION SUFFICIENT TO SECURE.** One who records the title of a book, and causes copyright notices to be printed on its title page, and delivers two printed copies to the librarian of Congress, thereby publishes the book so far as necessary to secure a copyright.

**THE PUBLICATION OF A BOOK DEFEATS THE COMMON-LAW RIGHT** of its author or publisher, whether a copyright is secured or not. After that, every one may make use of the book, if he sees fit.

**BOOK, PUBLICATION OF, WHAT IS AND WHAT IS NOT.**—One writing a book may keep the manuscript without printing it, or may print it and determine that the public may not see it, or may give it private circulation for a restricted purpose without losing his common-law rights therein, but if he deposits two copies of the book with the librarian of Congress, and delivers other copies to subscribers, though with an agreement that the book is loaned and not sold, and that it should not be given to, or seen by, others, it is published, and the author's common-law rights are at an end, and others may use the book and republish any information contained therein.

Suit to enjoin the defendant from making use of the plaintiff's reference books or confidential sheets and from copying, appropriating, publishing, or otherwise using information taken therefrom. The plaintiff was a domestic corporation engaged in the business of a mercantile agency. The information which it received in its business was printed twice a year in the form of a reference book, and it issued weekly a confidential sheet of changes and corrections. The books and sheets were furnished subscribers under a written agreement which, in substance, pro-



vided that they employed plaintiff, between dates designated, to aid in answering inquiries by verbal or written reports, reference books, and correction sheets respecting the responsibility and character of persons in the jewelry and kindred trades in the United States and Canada; that for such aid and services, including the loan of a book, the plaintiff should be paid a sum designated; that all information should be regarded as strictly confidential; that the title to the reference books should remain in the plaintiff, to whom the books should be returned on the expiration of the subscription. The plaintiff's books bore upon their cover a printed statement, to the effect that the book was the property of the plaintiff, and was held under an agreement with it. In June, 1890, the plaintiff, in apparent pursuance of the copyright law, deposited in the office of the librarian of Congress two copies of the printed reference book in which, following the title page, was a notice declaring that such book had been entered according to an act of Congress, in the year 1890, by the plaintiff, in the office of the librarian of Congress. The defendant appropriated from plaintiff's books certain material information thereof and used it in a publication of its own. The trial court issued the injunction as prayed for, and the defendant appealed.

Wheeler H. Peckham and Leopold Sondheim, for the appellants.

Howard Mansfield, for the respondent.

<sup>246</sup> PARKER, C. J. Thus far in the progress of this suit the plaintiff has succeeded in its attempt to convince the court that the original common-law right in the reference books, so called, has not been divested and, therefore, it is entitled to invoke the restraining power of the court to prevent the defendant from using in any way any information obtained therefrom. To the claim of the defendant, that the plaintiff divested itself of its common-law right by copyrighting the reference books pursuant to the provisions of the Revised Statutes of the United States, the plaintiff makes answer that it had not in fact perfected a copyright of the book and, therefore, its common-law right remains. It is true that plaintiff recorded the title of the book before publication, caused a copyright notice to be printed on the title page, and then delivered to the librarian of Congress two printed copies of the book with the notice of copyright printed on the title page, in pursuance of the statute which requires that such a number of copies shall be delivered to the li-

brarian within ten days after publication. So far as the record discloses, therefore, it would necessarily appear to any one making an examination of it for the purpose of ascertaining whether the plaintiff had secured to itself the benefit of copyright as to the reference book, that it had succeeded. But the plaintiff insists that its attempt, or pretended attempt, to secure a copyright was ineffectual, because of the omission on its part to publish the reference book.

We are not concerned in inquiring whether the plaintiff's steps, apparently looking to a copyright of the book, were taken for the purpose of procuring a copyright in good faith, <sup>247</sup> or merely for the purpose of securing such advantage as might accrue from the appearance of copyright. It, of course, cannot have at the same time the benefit of the copyright statute and also retain its common-law right. No proposition is better settled than that a statutory copyright operates to divest a party of the common-law right. If, then, what the plaintiff did amounted to such a publication of the reference book as was requisite in connection with the other steps taken to perfect a copyright, its common-law rights were divested, and its remedy against violators of the rights thus secured would have been by suit in the United States courts. But publication also operates to destroy the common-law rights, whether a copyright be secured or not. An invention, a painting, or a book, is the property of its creator. He may keep it for his own exclusive use or enjoyment if he sees fit. The public has no greater right to it, however useful it may be, than it would have to any other part of his personal property. But if he once publishes it, his property right in it is gone and every one may make use of it. A person who writes a book may keep the manuscript without printing it, and prevent any one from seeing it. He may take a still further step and cause the book to be printed and then determine that it shall not be seen by the public and store all the printed copies away, and still he has not made a publication of it within the meaning of the law. It continues to be his property, as he has not yet offered it to the public. If, while the books are thus stored away, a copy should be obtained surreptitiously and printed, or should the author loan one of the books to a friend to read and return, and in that manner a copy of the book should fall into the hands of some one who should attempt to print it, the author would be entitled to restrain publication, for the reason that he had not undertaken to put within the reach of the general public such thoughts or facts as he may have

expressed or stated in the book. Cases have arisen in which there was a private circulation for a restricted purpose, and the holding has been that it did not constitute a publication, as in *Prince* <sup>248</sup> *Albert v. Strange*, 2 De Gex & S. 652. In that case it appeared that Her Majesty and the Prince Consort had given to a number of friends copies of prints and etchings made for their own amusement, and this was held a private circulation and not a publication.

Out of a few cases of the same general character seems to have grown the idea that it is possible for a man by putting restrictions on the use of his books by subscribers, however numerous they may be, to retain in himself forever the common-law right of first publication. If that position be sustained by the judgment of the courts, then will have been obtained judicial legislation of far broader scope and much greater value to authors and others than that offered by the copyright statute.

Our attention has been called to but one previous case in which the precise question presented here has received consideration. In the case of *Ladd v. Oxnard*, 75 Fed. Rep. 705, the plaintiff published annually a book entitled "The United Mercantile Agency Credit Ratings," and had one hundred and seventy-nine subscribers; the stipulation between the complainant in that case and its subscribers was "that the book issued to each subscriber was a loan and not sold, and that if any copy was found in any other hands than those entitled to use it by the permission of the complainants, the publishers might take possession of it." In this case the plaintiff distributed its books under like restrictions. The plaintiff in *Ladd's* case brought his action in the United States circuit court, and the defendant sought to prevent a recovery upon the ground that, by reason of the special restriction on the use of the book, the plaintiff had not published it; therefore, his copyright had not been perfected, and the rights of the plaintiff were at common law, and not under the statutes. It will be seen, therefore, that the question was the same as that under consideration. Judge Putnam held that the copyright was complete. From his opinion we quote the following: "He (the defendant) claims that, by reason of the special restriction on the use of the book to which we have referred, there never has been a publication, and that, therefore, <sup>249</sup> the rights of the complainants are at common law and not under the statutes, so that this court has no jurisdiction of this suit, both parties being citizens of Massachusetts. It should be said in this connection that while the nature of the use of the complainant's



book was sought to be limited in the manner in which we have explained, there was no limit placed by the complainants on the extent or number of persons to whom the book might be distributed under the conditions which they had provided. Though adapted specially for persons engaged in the trades of which we have spoken, yet even these are indefinite in number, and there is no evidence that the circulation was intended to be limited to them. In any view it might be difficult to sustain the proposition, because, as the statute now stands, an author is compelled to complete his title to his copyright before publication, so there is at least one point of time, although it may be a very minute one, when the author, who has entitled himself to a copyright, is also entitled to look to the statutes of the United States for protection, notwithstanding he has not published. . . . However, we do not rest the case on this point, because we are satisfied there has been a publication. . . . So far as concerns the interests of the public and the general policy of the copyright statutes, this case stands in all respects practically the same as though the complainants' publication had been sold by unrestricted titles, and there is no substantial reason why, if the complainants had not obtained copyrights, they should now be protected against infringers."

We find ourselves in agreement with the learned judge, not only in the conclusion reached, but also in the argument which led to it, and, before referring to authorities upon that subject, it should be observed that it does not appear from this record but that every person in the United States was at liberty to become a subscriber of the plaintiff, and, as such, entitled to a reference book. Plaintiff's position, therefore, in effect is that a distinction should be drawn between selling or giving a book away and leasing it; that to offer to sell a book to the public or give it to public libraries, where all the public <sup>250</sup> may have access to it, is to publish it; but to lease it to such of the public as care for it is not to publish it. The latter is certainly an effective method of putting the contents of the book in the possession of such portions of the public as desire it. By this method a party parts with the secret in such a way that the public may know it, provided the individuals composing such public are willing to become subscribers and lease the book. And, if leasing books to the public generally does not constitute a publication of them, then an author or publisher would have but to extend the period of leasing from one year to ninety-nine or nine hundred and ninety-nine years, as is the case in certain leas-

ings of railroads, in order to secure almost as many lessees as there would be purchasers if the books were offered for sale. The buyer of the average book would be quite content with a restrictive title, which, nevertheless, assures him the possession of a book for either of the periods mentioned. It has not hitherto been understood to be the law that the common-law right could be so utilized as to secure to an author or publisher a continuing revenue from the public for a much longer period of time than Congress has been willing to grant to him the exclusive right to publish.

We shall now briefly refer to what has been said on the subject which seems to have persuaded counsel that the judgment in this case can be supported. In the first place it must be conceded it has not been said, except in *Ladd v. Oxnard*, 75 Fed. Rep. 705, that leasing a book under an agreement not to show it to any one constitutes a publication of it. And this is so, probably, because it was not until a comparatively recent period that an attempt seems to have been made to obtain for a book subscribers who should agree that they would neither show nor loan it to others. So, when Coppinger and Scruton, and Drone and Shortts, in their works on the subject of Copyright, assert that, "To constitute a publication it is necessary that the work should be exposed for sale, or offered gratuitously to the general public so that any person may have an opportunity of enjoying that for which copyright is intended to be secured," they did not intend to imply that the leasing of a book for a <sup>251</sup> year, or a term of years, to any and all persons who would accept it on such terms, would not constitute a publication. They did not have such a situation in mind. The consideration and discussion of the principles established by such cases as they succeeded in finding in England and this country, bearing upon the question of publication, did not suggest to them the possibility of such a claim being made.

It will be observed that the general rule which we have quoted from Coppinger, asserts, first, that to expose for sale is to constitute publication. It is not necessary that the book be actually sold; it is sufficient if it be offered to the public. The act of publication is the act of the author, and cannot be dependent upon the act of the purchaser. The actual sale of a copy is evidence that it has been offered to the public, but that fact may also be shown by other evidence. It then asserts that if a book be offered gratuitously to the general public, it will constitute publication. This may be done by presenting it to public li-

braries, and this is so because the author or publisher by that act puts it in such a place that all the public may see it if they choose. The reason why exposing for sale or offering gratuitously to the general public constitutes publication, is stated in the last part of the rule as follows: "So that any person may have an opportunity of enjoying that for which copyright is intended to be secured." And this reason, which lies at the foundation of all decisions upon this subject, is applicable to this situation. All persons were given the opportunity of enjoying this book upon the plaintiff's terms. Several cases have arisen where the courts have held that the private circulation of pictures, manuscripts, or printed books did not constitute a publication, such as *Prince Albert v. Strange*, 2 De Gex & S. 652; also *Bartlette v. Crittenden*, 4 McLean, 300, where the plaintiff, a teacher of bookkeeping, for the convenience of his pupils, wrote his system of instructions on separate cards, which they were permitted to keep for their convenience; so a gratuitous circulation of copies of a work among friends and acquaintances has been held not to amount to publication. *Dr. Paley's case*, 2 Ves. & B. 23, <sup>252</sup> was one where a bookseller was restrained from publishing manuscripts left by Dr. Paley for the use of his own parishioners only. *Coppinger*, in his work on Copyright, at page 117, after considering the last case cited and others, reached the following conclusion: "The distinction is in the limit of the circulation; if limited to friends and acquaintances it would not be a publication, but, if general, and not so limited, it would be." In this case the circulation was not limited to friends and acquaintances, or even to a class. The limitation was upon the character of the use which a subscriber could make of it.

It was the privilege of any and all persons who desired to become subscribers, to obtain possession and use of the reference books. The fact that the publisher of the book undertook to place restrictions on the use which individual purchasers could make of it, the effect of which might be to increase rather than diminish the public demand for the book, does not constitute such a limitation as takes away from the act of the plaintiff its real character, which is that of publication.

In *Callaghan v. Myers*, 128 U. S. 617, Myers was a reporter of the supreme court of the state of Illinois, and desiring to secure a copyright for such portions of the reports as he was entitled to have copyrighted, undertook to provide the three conditions prescribed by the copyright statute, namely: A deposit before publication of a printed copy of the title of the book; the giving



of information of the copyright by the insertion of a notice thereof on the title page or the next page; and by depositing a copy of the book within three months after the publication. It was insisted, as to one of the volumes, that Myers had not deposited a copy of the book within three months after the publication as the statute then required. It was shown that under the statutes of the state of Illinois, a reporter of decisions was required to supply to the secretary of state a certain number of copies of the reports for the purposes expressly provided by law. This statute Myers complied with more than three months before he deposited in the clerk's office a volume of the reports containing the insertion of the notice giving the information of a copyright. It did not <sup>253</sup> appear that these books were ever distributed from the secretary of state's office, but the court held that the delivery of the copies for the use of the state was a publication of the volumes, and, therefore, his copyright should fail. Myers did not expose the books for sale in the usual way; he was required by the statute to make delivery of them at the time he did, but that fact was held not to prevent publication, and the reason for it may be found, scattered through the cases bearing upon that subject, in the fact that by the delivery, whatever the occasion for it, the public, or an indefinite portion of it, were assured of access to the book without further action on the part of the author.

The case of *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480, is not in conflict with the views we have expressed. In that case the plaintiff procured an assignment of a play, which secured to him the author's right of its first printing and publication. Before printing it he put the play upon the stage, and thus the defendant was able to obtain and print it before the plaintiff did. Judgment was obtained preventing the defendant from selling, the court holding that the representation of a dramatic composition upon the stage is not such a dedication of it to the public as will authorize others to print and publish it without the author's permission. On his way to this conclusion Judge Allen said: "The rights of an author of a drama in its composition are twofold. He is entitled to the profit arising from its performance, and also from the sale of the manuscript, or the printing and publishing of it," and its representation on the stage "does not give to the hearer any title to the manuscript or a copy of it, or a right to the use of a copy."

In *Kiernan v. Manhattan Quotation Tel. Co.*, 50 How. Pr. 194, it was held that the transmission of news over telegraphic in-

struments does not constitute a general publication, the argument being that the case was analogous in principle to the writing and delivery of letters, the writer having such interest therein as will authorize him, in certain cases, to restrain their publication. Is there any difference, said the court, because he (the plaintiff) writes to his customers by telegraph?

254 The learned counsel for the respondent, apparently not unmindful that to sustain his contention requires the court to take a very long step in advance of any hitherto taken upon this question, urges the very large pecuniary interest involved for the plaintiff, and insists that courts of equity should find a way to protect property rights such as plaintiff claims, even if there are no precedents for doing so, and refers to the remarks of the court in *Piper v. Hoard*, 107 N. Y. 73, 1 Am. St. Rep. 789, in which the court said: "If the most that can be said is that the case is novel, and is not brought plainly within the limits of some adjudged case, we think such fact not enough to call for a reversal of this judgment."

If the plaintiff's interests are of so important a character, and the public interest would be best subserved were the law such as plaintiff insists it to be, then is presented a proper subject for legislative action. But our examination leads us to the conclusion that the present state of the law is that if a book be put within reach of the general public, so that all may have access to it, no matter what limitations be put upon the use of it by the individual subscriber or lessee, it is published, and what is known as the common-law copyright, or right of first publication, is gone. So far as is disclosed by this record, the plaintiff was in that situation at the time of the commencement of this action.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Gray, O'Brien, and Haight, JJ., concur, and Bartlett, Martin, and Vann, JJ., concur for reversal upon special ground, as follows:

We concur in the result upon the ground that the plaintiff, by depositing two copies of its reference book in the office of the librarian of Congress, published the same, even if it obtained no copyright; that if it did obtain a copyright, it thereby waived its common-law right of literary property in said book, and its statutory rights under federal legislation can be protected only in the federal courts.

**COPYRIGHT—RIGHT OF PROPERTY IN UNPUBLISHED MANUSCRIPT.**—An inventor or author has, independent of letters patent or copyright, an exclusive property in his invention or composition until, by publication, it becomes the property of the general public: *Tabor v. Hoffman*, 118 N. Y. 30; 16 Am. St. Rep. 740, and note; *Hoyt v. Mackenzie*, 3 Barb. 320, 49 Am. Dec. 178, and see extended note thereto. If the owner of a dramatic work having no copyright therein, causes it to be represented and exhibited for money, he thereby publishes it: *Keene v. Kimball*, 16 Gray, 545; 77 Am. Dec. 426. See extended note to *McCrea v. Marsh*, 71 Am. Dec. 751, 752. For a general discussion of the law of copyright, see 2 *Morgan on the Law of Literature*, 1-3.

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### ADAMS v. ALBERT.

[155 NEW YORK, 356.]

**PARTNERSHIP.—A JUDGMENT AGAINST A RETIRING PARTNER BECOMES A LIEN ONLY** on his interest in the firm. If it is insolvent, that interest is nothing at all.

**PARTNERSHIP—PARTNER RETIRING AND LEAVING HIS INTEREST IN THE BUSINESS.**—When a retiring partner permits an unliquidated interest to be continued in the business of the firm, such interest becomes liable for the partnership debts subsequently incurred, as well as for prior debts. It may be that the newly acquired assets which, in the course of business, take the place of the old, are subject to the lien of a new debt in preference to the old, and that the old debts remaining in specie are subject to the old in preference to the new debts, but, with this qualification, the rule seems to be well settled in equity, and this is but another way of saying that the interest of the retiring partner still remains at the risk of the business.

**PARTNERSHIP.—WHEN A RETIRING PARTNER PERMITS HIS PROPERTY TO BE HELD OUT** as the property of the firm, and as forming a part of the foundation on which its credit rests, he cannot subsequently successfully resist its application to the firm debts when necessary to their satisfaction. Nor can he assert, as against the creditors of the firm, a claim in his favor founded upon its liability for the property so left in its possession, and which he has permitted to be held out as firm assets.

W. W. McFarland, for the appellant.

James L. Bishop and Rudolph F. Rabe, for the respondent.

**358 O'BRIEN, J.** The sole question in this case is one of equitable priority. The controversy is between the plaintiff and the defendant Nicholas Albert, each claiming the prior right to a fund in court which represents the proceeds of a stock of goods that on December 23, 1893, was owned by the firm of Albert, Haager & Company. That firm was composed of Henry Albert and Charles Haager, and on the day last mentioned was, and for some time had been, utterly insolvent. On that day Henry Albert confessed an individual judgment to his father, Nicholas,



for fifty thousand dollars. On the 28th of December he confessed an individual judgment to the plaintiff for about forty thousand dollars. Executions were promptly issued upon both judgments to the sheriff and levies made upon the firm goods, that in favor of Nicholas being, of course, prior in point of time. The plaintiff, however, has claimed from the beginning that its debt, by reason of the facts and circumstances hereafter disclosed, had the prior and superior right. In order to avoid a sacrifice of the goods they were sold in <sup>350</sup> due course of business under a written agreement of the parties, and the proceeds deposited to await the result of this action, which the agreement contemplated and provided for.

While both parties claim to be prior creditors, the judgments, as we have seen, are not against the firm, but against one of its individual members. This seems to have occurred from the mistaken notion that the other partner had retired on the 1st of January previous to the failure, and that the defendant in the judgments had assumed all the firm debts and had acquired all the firm property. But such was not the fact as clearly appears in this case. The firm expired by limitation on January 1st previous to the failure, but there was no actual dissolution, and both partners, in fact, continued as before in the business. The title to the firm property was not changed, and there was no assumption by either partner of the firm debts. In this situation the individual judgments against Henry became liens only on his individual interest in the firm assets, and as the firm was hopelessly insolvent, that interest was nothing at all.

We cannot, therefore, perceive how these judgments or executions play any material part in the controversy. Both parties are remitted to their original rights or claims against the firm property. They stand now in that respect where they stood before the judgments were entered. The party that then had the superior lien in equity upon the goods, if either, has now the superior right to the proceeds or fund that represents them. That fund is in court, and the purpose of this action is to determine and adjust the conflicting claims of the parties in law or equity. The written stipulation is broad in its scope and purpose, and requires the court to look beyond the judgments and determine what the equities of the respective parties were as against the firm property. Neither party has gained nor lost any right or advantage in consequence of the recovery of the judgments or the levies made under them by the sheriff. The case is controlled by principles of equity founded upon the law of partner-

ship in the marshaling of the firm assets, and the adjustment of the claims of partnership <sup>360</sup> creditors. In order to apply these principles it is necessary to state some antecedent facts that appear in the case and that are undisputed.

The plaintiff is an English corporation engaged in the manufacture and sale of lace goods at Nottingham. The defendant, Nicholas Albert, came to this country from Europe about 1854. In 1867 he became a member of a firm in New York that was largely engaged in dealing in lace goods. When that firm was dissolved two years later, he formed a partnership with two other persons in the same business. This firm was dissolved December 31, 1885, and he retired from business, and soon afterward went to reside at or near St. Gall, in Switzerland, where he has since resided. His son Henry took his place in the firm, the other two members being the same persons who were in the firm when the father retired. The same private ledger that had been used by the old firms was continued by the new firm, in which the partners' capital account was entered. When Nicholas retired and the new firm was formed on the first day of January, 1886, his nominal interest in the business, as appears from this book, was one hundred and fifteen thousand dollars, but the business of the old firm was never wound up by any settlement or actual liquidation. This interest was ascertained by deducting the debts of the firm from the nominal assets. What his interest would have been upon an actual liquidation cannot now be known, and never was known with anything like accuracy.

But whatever it was it remained with the new firm. All that was done upon the retirement of Nicholas was to make certain entries in the ledger referred to, containing the capital account, by which it was made to appear that the son had an individual interest in the new firm of fifty thousand dollars, and the firm itself the balance of the father's interest. The father took no obligation or promise of any kind from the son or from the firm, and none was created otherwise than by the entry on the ledger. It cannot be doubted that it was the interest thus left by Nicholas in the business that gave and was intended to give the new firm, of which the son was the head, credit and standing <sup>361</sup> in the business world. The plaintiff had considerable dealings with the old firms and continued to supply the new firm with a large part of their stock, which was always purchased on credit. The name of the new firm was the same as that of the old. In 1888 one of the members of the new firm dropped out, and this left the son and the other partner the sole members of the new firm, but no other change was made.

The interest of Nicholas still remained in the business, he receiving each year payments or credits of various sums of money, representing sometimes six per cent and sometimes five per cent on what he left with the firm. This, with some other comparatively small amounts, was the only money that he ever drew from the business. After the retirement of the father the business was not prosperous. The new firm, especially in later years, was continually behind in their payments to the plaintiff, upon whose forbearance and credit the success of the firm largely depended. In July, 1891, the firm was indebted to the plaintiff in the sum of about fifty thousand dollars for goods.

The managing director, feeling anxious and uncertain about the safety of this debt and the condition of the firm, visited Nicholas, the father, at his home near St. Gall. The condition of the firm with reference to its ability to pay, and the propriety and safety of extending future credits, was the subject of their interview. The father then gave to the plaintiff's agent assurances which not only resulted in forbearance as to the debt due, but further credit. They differ somewhat now with respect to what these assurances were, but for all the purposes of the case they may be here stated in the language of the findings of the learned trial judge dismissing the plaintiff's complaint, and which are based upon the testimony of Nicholas himself.

He finds that Nicholas said to the plaintiff's agent, "You need not have any fear at all. That is all right. Your firm won't lose anything because, as much as I know, the business over there is good, and I have over one hundred thousand dollars capital in the <sup>362</sup> business; fifty thousand dollars is a loan to my son, and the remaining part to the firm, so you need not be afraid at all; that is all right." This statement seems to have satisfied the plaintiff's agent, and he not only allowed the debt to remain in the condition that it then was, but he continued to give credit to the firm to the end and to sell them goods on the faith of the statement, and when the son confessed the judgment already mentioned to his father, which put an end to the business, a large part of the assets of the firm consisted of the very goods sold to them by the plaintiff on credit, and hence a large part of the fund in controversy is traced to the plaintiff's goods, sold in the manner described.

The son, Henry, was present at the interview at St. Gall, and participated in it. The plaintiff's agent says that the father asked his son to put the substance of the interview in writing, but this the father denies. However that may be, it is undispu-



ted that on the same day the son delivered to the agent a letter, under his own signature, in which he referred "to our conversation of to-day," and wishing to set the agent's mind at ease with respect to his debt, he proceeded to state that his father had a capital of about one hundred thousand dollars in the business, half of which was at the business risk and the balance loaned to him, and that the agent could rest assured that he would be paid in full before any of this capital should be withdrawn. That Henry, in behalf of his firm in New York, did give to the agent in various forms the most explicit assurances that the father's interest was at the risk of the business is not disputed, but since the courts below have held that the father was not bound by them, the case may rest on his own version of the transaction as found by the learned trial judge.

In giving to this interview its proper significance not much importance can be attached to the use of the word "loan." All that Nicholas could have meant by that, as we shall see hereafter, was to describe the manner in which his interest in the old firm had been distributed in the capital account of the new firm. The important fact was that his interest still remained in the concern as capital to give it strength and <sup>363</sup> credit. He certainly could not have intended the plaintiff's agent to understand that he, Nicholas, had a debt against the firm and against his son for over one hundred thousand dollars, that he was at liberty to enforce at any time. Such a situation, instead of removing the agent's doubts and fears with respect to the financial condition of the firm, might well have aroused his worst apprehensions. That the agent did not understand the situation in that way is too plain for argument, when we consider the purpose of the interview, the substance of what took place and what followed. That Nicholas did not intend to be understood in that sense is equally clear, since he knew that the agent had doubts with respect to the ability of the firm to pay its debts, and to reveal to his mind such a dangerous situation would aggravate his fears instead of dispelling them.

Hence, the question is whether, upon such a state of facts, Nicholas can now assume, with respect to this fund, the attitude of a preferred creditor against all the other creditors of the firm, and especially against the plaintiff, who, upon the faith of all these assurances, parted with the legal title to the property which the firm had at the time of the failure, and which is represented by the fund in question. The solution of this problem does not call for any discussion of the question of fraud, actual

or constructive, but depends upon principles of equity. It is proper, however, to say that, while there is in the record abundant material for imputing fraud to Henry, the son, and the firm for which he acted, there is no reason whatever to suppose that Nicholas, his father, was in any way connected with it. Even in the interview at St. Gall, already described, he acted honestly and doubtless meant just what his words fairly implied. He was, as all now admit, deceived as to the condition of the business in New York by his son. He had no hand nor part in procuring the judgment under which he now claims, and, in fact, he knew nothing about it until after it was entered. The plan of confessing judgment and acquiring a first lien on the property of the firm was conceived and executed by the son alone. It is true that he is now in the attitude of claiming the benefit and advantage <sup>304</sup> of that judgment, but it is quite probable that he has been made to assume that position by the voluntary action of his son.

Therefore, leaving entirely out of view all questions of actual fraud, and relegating the judgments to their proper place in the controversy as merely representing the debts in another form, we have simply two claimants of a fund which is subject to the disposition of a court of equity on equitable principles, and the question is, Which of the two claimants has the superior right in equity?

When Nicholas retired from the firm on the 1st of January, 1886, leaving his entire unliquidated interest in it as capital, it remained at the risk of the business, and his rights in the firm property thereafter became subordinate to the rights of creditors of the new firm as well as the old firm, and this without regard to the manner in which by his assent, express or implied, that interest was distributed on the book containing the account of capital. On the undisputed facts disclosed by this case, he cannot, upon failure of the new firm, assert any interest in the firm assets to the prejudice of creditors. The nominal capital, which Nicholas, the father, left in the concern, however distributed upon the books, was the thing which gave and was intended to give standing and credit to the new firm, and hence it would now be inequitable to deprive the firm creditors of the benefit of it in favor of the party who furnished it, or rather allowed it to remain for the purpose of promoting the success of a business in which his son was largely interested. That son took his father's place in the firm, and, without even a change of name, it continued the same business substantially

upon the credit and reputation which the still unascertained and unliquidated interest of the father gave to it. The money value of the interest of the retiring partner depended upon what that interest would produce when reduced to money, after the discharge of all debts, and it was never ascertained by that process. The facts in the record indicate that had that course been pursued the real interest would prove to be much less than the nominal interest. To allow the retiring partner now, when the new firm <sup>365</sup> has failed, to give to his nominal interest, left in the business in the manner and under the circumstances stated, the form and character of a fixed debt against the new firm to the exclusion of the plaintiff's claim, would be, to use a very mild expression, contrary to equity.

The principle to be deduced from the elementary books and the adjudged cases, which applies to such a situation as the facts in this case disclose, is substantially this: When a retiring partner allows his unliquidated interest to be continued in the business of a new firm, the interest thus left becomes liable for the partnership debts subsequently incurred, as well as the prior debts. It may be that newly-acquired assets, which, in the course of business take the place of the old, are subject to the lien of the new debts in preference to the old, and that the old assets remaining in specie are subject to the old in preference to the new debts, but with this qualification the rule seems to be well settled in equity, and that is but another way of saying that the interest of the retiring partner still remains at the risk of the business: *Willis v. Sharp*, 113 N. Y. 586; *Burwell v. Mandeville*, 2 How. 560; *Hoyt v. Sprague*, 103 U. S. 613; *Nerot v. Burnand*, 4 Russ. 247; *Payne v. Hornby*, 25 Beav. 280; *Lindley on Partnership*, 700, 702.

The principle is stated in this form by a learned writer on the law of partnership: "If, therefore, the person, instead of permitting himself to be held out as a partner, permits his property to be held out as the property of the firm, and as forming a part of the foundation on which its credit rests, the very same reason which held him personally in the first case with all his property, would now hold that part of his property so permitted to appear as the property of the firm": *Parsons on Partnership*, 3d ed., 537. That must mean that the interest of the retiring partner, set over on the books to the new firm, is continued at the risk of the business. Hence the result must be that, as against the plaintiff, the defendant, Nicholas Albert, cannot now assume the position of a firm creditor in virtue of his nominal interest



in the old firm, but left by him for the use of the new firm as capital. This would <sup>366</sup> deplete the assets of the insolvent firm to which he intrusted his interest on retiring from the old firm or upon its dissolution, to the prejudice of the just rights of creditors, a consequence which equity does not tolerate: *Baily v. Hornthal*, 154 N. Y. 648; 61 Am. St. Rep. 645.

The application of this principle is decisive of the case, and while it might be developed and illustrated at greater length by discussion and by reference to other authorities, enough has been said to indicate and make reasonably clear our reasons for the conclusion that the plaintiff has, in equity, the superior right to the fund which is the subject of litigation. In this view of the case it is not important to determine whether the interview between the plaintiff's agent and Nicholas, at St. Gall, in July, 1891, with what followed, constitutes a technical estoppel, since the principle of equity, to which attention has been directed, would apply if that interview had never taken place. But it has an important bearing upon another feature of the case, and gives great aid in the application of the principle.

Whatever else that event may prove, or tend to prove, it shows quite clearly that Nicholas then and all along understood the situation just as equity now views it under the rule and principle stated. If, on the first day of January, 1886, he became, as now claimed, a creditor of the firm and of his son to the extent of his nominal interest of one hundred and fifteen thousand dollars, then it would be apparent that the new firm started in business with practically no capital at all, since a liquidation of the assets would barely pay the debts. Indeed, if that was the real situation, the firm was perilously near insolvency from the beginning, and that situation did not improve from the date of the organization to July, 1891, when the interview at St. Gall took place. On the contrary, everything tends to show that it was aggravated, and hence if Nicholas then had this large debt against the concern, which he was at liberty to enforce at pleasure, he could not as an honest man have told the plaintiff's agent, as he did in substance, that the plaintiff's debt was not only safe, but that the agent could safely continue <sup>367</sup> to give further credit. He evidently understood then, as equity now regards it, that his unliquidated interest, whatever it might be, was at the risk of the business, and so regarding the nature of his claim, his conduct is consistent with the highest standard of commercial morality, but upon no other hypothesis can his acts and words be reconciled with that honesty of purpose which is now freely con-

ceded to him on all sides. His present position, which it is but just to say was not of his own seeking, but brought about by the voluntary action of his son, would seem to invite a conflict between his personal reputation for integrity as a business man and his pecuniary interest, since either the one or the other must suffer as the result of this case. The principle of equity, upon which our decision rests, preserves the former while it may unfavorably affect the latter.

There are no other questions in the case. It may be that the view we have taken with respect to the principle that governs the rights of the parties may give rise hereafter to some questions of practice or procedure, but they belong to the court of original jurisdiction.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except Parker, C. J., not sitting, and Vann, J., dissenting.

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**PARTNERSHIP—RIGHTS OF INDIVIDUAL CREDITORS.**—A partner's interest in partnership property is his share after the firm debts are paid, and an individual creditor of such partner can only acquire a lien on such interest. If the partnership is insolvent, there is no interest upon which he can acquire a lien: *White v. Dougherty*, 1 Mart. & Y. 309; 17 Am. Dec. 802; *Goldthwaite v. Janney*, 102 Ala. 431; 48 Am. St. Rep. 56; monographic note to *Smith v. Smith*, 43 Am. St. Rep. 371.

**PARTNERSHIP—LIABILITIES OF RETIRING PARTNERSHIP.**—A person retiring from the partnership, in order to relieve himself from further liabilities incurred by the firm, must bring actual notice of his retirement, and of the dissolution of the partnership, home to such persons as have been accustomed to deal with it: *Ellison v. Sexton*, 105 N. C. 356; 18 Am. St. Rep. 907; *Williams v. Bowers*, 15 Cal. 321; 76 Am. Dec. 489. And persons holding themselves out as partners may be held liable as such to persons dealing with the partnership in reliance upon such representations: *Smith v. Hill*, 45 Vt. 90; 12 Am. Rep. 189; *Green v. Taylor*, 98 Ky. 330; 56 Am. St. Rep. 375, and note; *Fletcher v. Pullen*, 70 Md. 205; 14 Am. St. Rep. 355, and note. See *Webster v. Clark*, 34 Fla. 637; 43 Am. St. Rep. 217, and note.

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## SIMON v. VANDEVEER.

[155 New York, 377.]

**VENDOR AND PURCHASER—TITLE OF REAL PROPERTY, WHEN NOT MARKETABLE.**—If an action has been commenced and a notice thereof filed apparently affecting the title of real property, and the complaint states a good cause of action, the title is not marketable, and the purchaser will not be compelled to accept it. He is not required to go outside and look up the evidence on which the action is based, and to determine whether or not it can be maintained.

Louis Manheim, for the appellants.

Albert G. McDonald, for the respondent.

**378** HAIGHT, J. This action was brought to recover the amount paid upon contracts for the purchase of real property, upon the ground that the title was defective or so encumbered as to make it unmarketable.

On the fifth day of October, 1892, the day agreed upon by the parties for the transfer of the title, the defendant tendered to the plaintiffs deeds of the land, proper and sufficient in form, but they refused to receive the deeds, or to pay the balance of the purchase price in accordance with the terms of the contract, for the reason that a *lis pendens* and complaint **379** had been filed in the office of the clerk of Kings county on September 29, 1892, in an action brought by one George W. Dalton against the defendant in this action, in which Dalton claimed an interest in the real estate which the defendant had contracted to convey to these plaintiffs. The defendant insisted that his title was not impaired or rendered unmarketable by reason of the Dalton action and *lis pendens*, but did not produce or call the attention of the plaintiffs to the contract upon which that action was based.

Prior to the twenty-fifth day of February, 1891, the defendant's title is unquestioned. On that day he entered into a written contract with Dalton to act as his agent in surveying, opening streets, and laying out lots for sale of about sixty-five acres of land, of which that contracted to be conveyed to the plaintiffs was a part. Under the contract Dalton was to make the sales of the property, pay the defendant three thousand dollars per acre and three-fourths of all that should be received in excess thereof, Dalton reserving the other quarter for his services.

We fully agree with the learned general term in its conclusion that under this contract Dalton acquired no title or interest in the land. But, as we have seen, this contract was not produced, and the attention of the plaintiffs called thereto at the time agreed upon for the transfer of the property to them. No claim has been made that the complaint does not state a good cause of action, or that under it Dalton would not have an interest in the real property. Instead of averring an employment as agent, as provided for in the contract, it alleges that the plaintiffs and defendant entered into a copartnership, in which each partner was to have an interest in the lands, and that the defendant, for the purpose of depriving Dalton of his rightful interest



and share in the premises, wrongfully dissolved the copartnership and would not allow him to participate in the profits arising from the contract, or account to him for his share or interest. The relief demanded was that he, Dalton, be declared to be an owner, or part owner, of the land and premises described; that an accounting be had and that a receiver be appointed to take possession <sup>380</sup> of the premises and to sell the lands, or that the premises be divided under the direction of the court according to the respective rights of the parties.

It will be observed that the action was commenced only six days before the day fixed for the passing of the title under the contract with the plaintiffs. The commencement of that action was not discovered by the plaintiffs until the day before and then a contract was found on file, but it was not examined by the plaintiffs' counsel, and he did not know that it was the contract upon which the Dalton action was based, or that there was not another contract.

If the allegations of the complaint were true, then the title was not marketable. Upon the trial of this action it turned out that the essential allegation had no foundation in fact, but these facts were not known by the plaintiffs at the time of their rejection of the title. We are thus brought to the question in the case. The plaintiffs contend that they were not required to investigate the title further; while the defendant insists that the burden rested upon them to show that the Dalton action was based upon facts that would establish that he had an interest in the property, or that the result of the trial of that issue would be doubtful.

The rule is well stated by Andrews, C. J., in the recent case of *Greenblatt v. Hermann*, 144 N. Y. 13, 18: "A vendee who refuses to take title upon the ground of defect therein, must point out the objection and give proof tending to establish it, or to create such a doubt in respect thereto as to render the title unmarketable. If the defect or doubt is disclosed on the face of the record title, he need go no further, but if it depends upon some extrinsic fact not disclosed by the record, he must show the fact which justifies his refusal to accept the title tendered."

In the case of *Aldrich v. Bailey*, 132 N. Y. 85, we held that an action brought and a *lis pendens* filed did not justify the rejection of the title by the vendee when the complaint failed to state a cause of action.

In *Fleming v. Burnham*, 100 N. Y. 1, it was held <sup>381</sup> that a title open to reasonable doubt is not marketable, and a pur-

chaser will not be required to determine a disputed question of fact or a doubtful question of law with reference thereto.

In *Moore v. Williams*, 115 N. Y. 586, 12 Am. St. Rep. 844, it was held that it was not necessary for a vendee of real estate, in order to justify a refusal to complete the purchase, to show that the title offered was absolutely bad. It is sufficient if he had to resort to parol evidence to remove the apparent encumbrance.

We now come to the consideration of the case of *Hayes v. Nourse*, 114 N. Y. 595, 11 Am. St. Rep. 700, upon which the learned general term based its decision. That action was brought to recover a payment made at the time of the execution of a contract for the sale of lands on the ground of a defect in the title. In that case one Peter Kemble owned the premises in 1819. He died in 1823, leaving a will in which he devised the premises to his five children, share and share alike; four of the children conveyed to Mary Kemble, the fifth. She recorded her deed, took possession of the land and remained until October, 1854, when she conveyed to James N. Paulding, who took possession and remained until August, 1884, when he conveyed to the defendant in trust for the benefit of creditors. In 1885 the defendant contracted to sell to the plaintiff. The defect in the title complained of was that in July, 1836, an action was commenced in the late court of chancery by John McGeer and others against Gouverneur Kemble and others, being the five children and devisees of Peter Kemble, in which it was alleged in the bill that on August 13, 1819, Peter Kemble had entered into an agreement with Arthur McGeer, the father of the complainants, in which he agreed to sell, and McGeer to purchase, the lands, and that under that contract McGeer entered into possession, and so remained until his death, when the defendants in that action re-entered and retained the possession. A lis pendens was filed on the same day that the action was brought. It appeared that no further proceedings were taken in the case, and the last we hear of it was in 1844, when there was a substitution of attorneys for the complainants. Upon the trial of this action James N. Paulding was sworn as a witness, and <sup>382</sup> testified that the first that he knew of any trouble with the title was twenty years before, when he sold the lots at auction. The purchaser found the papers in the chancery suit on file and refused to take title. At that time Paulding tells us he tried to find the McGeers, and employed two persons for that purpose, who made diligent search, but had been unable to get any trace of them.

Paulding had purchased without actual notice of the alleged claim of the McGeers. In that case it was held that, owing to the facts that sixty-one years had elapsed since the filing of the *lis pendens* and the commencement of the suit in chancery, the right to revive and continue the action against the successors in interest of a deceased defendant had been lost, and that the *lis pendens* and action pending no longer continued to be a cloud upon the title. Follett, C. J., in delivering the opinion of the court in that case, gave expression to the following: "A pending action brought to establish title to, or a lien upon, land, does not of itself, nor does a duly recorded notice of its pendency, make the title defective or create a lien on the land." It is upon this clause of the opinion that the general term rests its conclusion that the vendee must go further and make inquiry as to the evidence and determine whether the action can be maintained. The rule which Judge Follett attempted to state was based upon the case of *Bull v. Hutchens*, 32 Beav. 615, in which the master of the rolls said that "the *lis pendens* is merely notice of some claim made in respect of the property which is the subject of the suit, but that it does not, of itself, create an encumbrance apart from the equity on which the action is founded. If it were otherwise, a *lis pendens* having nothing to do with the matter might create an encumbrance. It was notice of the existence of a suit in chancery, and required all persons dealing with the property to look at the proceedings to see whether it did not affect the property or not." In other words, he must look to the complaint and see whether it states a cause of action, as we did in *Aldrich v. Bailey*, 132 N. Y. 85. This, we think, is and should be the limit of the rule. To require the purchaser to go outside and look up the evidence upon which an action was based, and then determine whether <sup>383</sup> it could be maintained, would impose upon him a burden which, we think, would be unjust and not warranted by the authorities. Whether the plaintiffs would have been required to construe the contract, and to have determined whether the action could be maintained upon it, is not necessary for us to now consider. Had the defendant produced the contract and shown to the plaintiffs that it was the only contract upon which Dalton's action was founded, the question might have been raised for our determination, but we think the plaintiffs were not required to look up the contract or the evidence upon which Dalton relied for the establishment of his claim. They cannot be compelled to purchase and then defend a lawsuit regularly commenced, in which the complaint states a good cause of action.



The judgment of the general term should be reversed and that entered upon the verdict affirmed, with costs.

All concur.

Judgment accordingly.

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**VENDOR AND PURCHASER—WHEN TITLE IS UNMARKETABLE.**—A marketable title in equity is one in which there is no doubt involved, either as to matter of law or fact. If there is color of outstanding title which may prove substantial, though there is not enough in evidence to enable the chancellor to say so, a purchaser is not compelled to take it and encounter the hazard of litigation: *Herman v. Somers*, 158 Pa. St. 424; 38 Am. St. Rep. 851, and note; *Vought v. Williams*, 120 N. Y. 253; 17 Am. St. Rep. 634, and note. It must be such a title as can be sold to a reasonable purchaser, or mortgaged to a person of reasonable prudence as security for the loan of money: *Moore v. Williams*, 115 N. Y. 586; 12 Am. St. Rep. 844, and note.

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### ARCHER v. ARCHER.

[155 NEW YORK, 415.]

**JUDICIAL SALE, ASSIGNEE OF BID, JURISDICTION OVER.**—If a purchaser at a judicial sale assigns his bid, and the assignee accepts the assignment and requests a conveyance to be made to him, he thereby submits himself to the jurisdiction of the court, and may be compelled to make payment by the same proceeding which, but for the assignment, might be prosecuted against the original purchaser.

Edwin L. Kalish, for the appellant.

Seward Baker, for the respondent.

<sup>416</sup> **PARKER, C. J.** In pursuance of a judgment of sale in partition, the appellant Bach purchased lot No. 2, while William Booth bought lot No. 1. The terms of sale were signed by the purchasers respectively, who, at the same time, paid down ten per cent required upon the signing of the terms of sale. A few days later Bach took an assignment of Booth's bid, and immediately thereafter advised the attorney for the plaintiff that he had done so, at the same time directing that a deed be prepared conveying to him lots Nos. 1 and 2 in one <sup>417</sup> conveyance. The referee prepared and executed the deed in accordance with such instructions, but Bach subsequently refused to accept it on the ground that a stream of water ran across Oostdorp avenue and across plot No. 1, and then across Mechanic street. Proceedings were thereafter instituted to compel Bach to take title, resulting in an order of the special term directing him to com-

plete his purchase, which order was affirmed at the general term. On this review the only question presented is whether the court had jurisdiction to compel Bach to take title to plot No. 1, which was purchased at the sale by Booth, who immediately thereafter, in writing, assigned his bid, and the terms of sale and his rights thereunder to Bach. The jurisdiction of the court to compel a purchaser at a judicial sale to complete his purchase is well settled: *Wood v. Mann*, 3 Sum. 322; *Requa v. Rea*, 2 Paige, 341; *Cazet v. Hubbell*, 36 N. Y. 677; *Miller v. Collyer*, 36 Barb. 250.

Judge Story, in *Wood v. Mann*, 3 Sum. 322, says that the authority to compel a purchaser to complete his purchase "stands upon the strictest principles of the court, that he who makes himself a party to the proceedings of the court, and undertakes to do a particular act under the decretal orders of the court may be compelled to perform what he has undertaken. It is a mere incident to the due exercise of the principal jurisdiction, and is indispensable to the due enforcement of the orders of the court upon persons who have submitted themselves to its jurisdiction."

In *Proctor v. Farnam*, 5 Paige, 614, the court said: "It is a familiar principle that any one who interferes pendente lite with the subject matter of a suit in equity, submits himself to the jurisdiction of the court, to be exercised by petition or motion in the original suit, and that he acquires no rights in that manner which may not be modified, controlled, or directed, without any new proceeding directly against him; and this doctrine applies with full force to this case of a purchaser under a decree, and to all who claim interest under him." In the case just cited the assignee of the bid of a purchaser <sup>418</sup> at a judicial sale obtained the order of the court, against the protest of such purchaser, directing the execution of the conveyance immediately to him by the master. The appellant urges, however, that this rule is not applicable to the mere assignee of the vendee of a contract to purchase land, because the assignee, by simply accepting the assignment, has not undertaken to do any particular act under the orders of the court, so as to vest it with the authority to put him in motion; that by the assignment in this matter Bach acquired the option to complete the purchase and take title, but that no one could compel him to do so, not even his assignor, and that in such case the remedy under the judgment is to compel the purchaser at the sale to complete the purchase.

The difficulty with the appellant's position seems to lie in

his assumption of facts. While it is true that the facts in this case are not like those of any other to which our attention has been called, still they bring this case within the principle established in the cases cited, which predicates the power of the court to compel the purchaser to take title, upon his interference with the proceedings had under the order of the court, by which it is said he subjects himself to its jurisdiction and may be compelled to perform whatever he has undertaken. The interference in the cases cited was in bidding at a judicial sale and undertaking to pay for the property the sum bid. Now, in this case, while the appellant did not purchase at the sale, and, therefore, was not within the facts of such cases as I have referred to, he did purchase, for a valuable consideration, of the vendee his bid, which, together with the terms of sale, was assigned to him in writing. Had he stopped there, the question which the appellant argues would be before us. But he did not. Armed with the assignment of the bid, he went to the attorney for the plaintiff, to whom he showed the evidence of his right to the plot purchased by Booth, and requested and directed that the deed to be prepared should convey to him plots Nos. 1 and 2 in one conveyance.

The attorney for the plaintiff and the referee promptly recognized the substitution of Bach for Booth as to plot No. 419 1, and in due time prepared and executed a deed for the property in the manner requested by Bach. But this was not his only interference with the proceedings. Later on he found that a small stream ran across the premises, and he objected that this stream constituted an encumbrance, and requested to be relieved from the purchase on that ground. This request was denied, and on the 13th of July Bach's attorney addressed a letter to the plaintiff's attorney, which read as follows:

"Seward Baker, Esqr.:

"Dear Sir.—Mr. Bach desires to be relieved from the purchase on the grounds I stated to you some time ago. Will you bring up this question by a motion to compel him to complete? If you desire to do this, I suggest that we agree upon the papers within a few days, as I intend going out of town during August.

"Yours truly,

"EDWIN L. KALISH."

As we have already observed, the ground of his objection was that this stream of water constituted an encumbrance. No other ground was ever suggested so far as this record discloses.



Bach makes an affidavit and so does his attorney, but neither of them suggests as an objection that Bach being merely the assignee of the purchaser of plot No. 1, the court could not require him to take title. The letter, therefore, was an invitation to institute this proceeding. It recognized that his conduct had been such as to give the court jurisdiction, and in view of what had taken place between the parties before it was written, it imported that he hoped to be relieved by the court from completing the purchase upon the ground that the stream of water constituted an encumbrance. His invitation for the institution of this proceeding was promptly accepted, and affidavits were presented by the attorneys for the respective parties and by Bach himself, but the only fact in controversy in the affidavits related to the question of knowledge on Bach's part as to the existence of the stream at the time he purchased the bid from Booth.

<sup>420</sup> It is unnecessary to pursue this subject further, for it is quite apparent that Bach so far interfered with the proceedings of the court as to submit himself to its jurisdiction within the rule to which we have referred. Not only did he take an assignment of the bid and demand a deed of the property, but he also in recognition of the jurisdiction of the court invited the institution of a proceeding by means of which he hoped to obtain an adjudication relieving him from taking title because of a supposed encumbrance.

The order should be affirmed, with costs.

All concur.

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**JUDICIAL SALES—ASSIGNMENT OF BID—RIGHTS OF ASSIGNEE.**—The assignee of a certificate of purchase issued upon a judicial sale takes subject to equities existing against his assignor: *Bruschke v. Wright*, 166 Ill. 183; 57 Am. St. Rep. 125. It is common for such assignments to be made, as well as assignments of bids, such as was made in the principal case, and the assignee is properly held to subject himself to the jurisdiction of the court to the same extent as the original purchaser: *Proctor v. Farnham*, 5 Paige, 614; *Archer v. Archer*, 84 Hun, 297. This is in accord with the rule that assignees of a party pendente lite are bound by the decree in the cause: *Bank of South Carolina v. Rose*, 1 Strob. Eq. 257. See monographic note to *Stout v. Philippi Mfg. Co.*, 56 Am. St. Rep. 853-878; also *Ayres v. Campbell*, 9 Iowa, 213; 74 Am. Dec. 346.

## MOORE v. POTTER.

[155 NEW YORK, 481.]

**RECEIVER AND VENDOR, RIGHT TO RESELL PROPERTY TO ASCERTAIN DAMAGES.**—If a receiver purchases personal property, but fails to make payment therefor, the vendor may, as in the case of a sale to a private person, resell the property for the best price he can obtain, for the purpose of ascertaining his damages, and without first applying to the court for permission to make such sale.

**A VENDOR OF PERSONAL PROPERTY,** when the vendee declines to take and pay for it, ordinarily has the choice of any of three methods of indemnifying himself against loss: 1. He may store or retain the property for the vendee and sue him for the entire price; 2. He may sell the property and recover the difference between the contract price and the price obtained on the resale; or 3. He may keep the property as his own and recover the difference between the market value at the time and place of delivery and the contract price.

**SALE—VENDOR, WHETHER ACTS AS AGENT OF THE VENDEE IN MAKING A RESALE.**—Though it has sometimes been said that a vendor, in making a resale of the property when the vendee does not take and pay for it, acts as agent for the latter, this does not accurately describe their relations. The vendor is really acting for himself in disposing of the property for the purpose of ascertaining the actual damages he may sustain. He owes to the vendee, in making this sale, duties which, in some respect, resemble those of an agent in so far as he is required to exercise the same good faith which would be required of him as agent, in obtaining the best price, and in following any proper instructions which the vendee may give as to the time and manner in which the sale shall be made.

**RECEIVER, INTERFERENCE WITH.**—When a receiver has purchased, but has not paid for, nor taken possession of, personal property, the vendor, in reselling it, cannot be regarded as in contempt of court nor as interfering with the possession of the receiver.

Action against the defendant as receiver of a corporation to recover a balance claimed to be due the plaintiff. The plaintiff's assignor had entered into a contract with the corporation to sell it a quantity of yarn. Deliveries were made, pursuant to the contract, for some time, when a discontinuance was requested. Later the defendant was appointed receiver of the corporation, and refused to receive any more yarn under the contract. The plaintiff then notified the receiver that he would be obliged to sell the undelivered portion and hold him responsible for any resulting loss, and that the plaintiff would wait four days for such instructions as the defendant thought proper to give respecting the sale. The sale was afterward made, and after charging himself with the proceeds of the sale, the sum of seven hundred and seventy-two dollars remained due plaintiff under

the contract. The claim for this balance was presented to the plaintiff as receiver, but he ignored it, and paid out all the moneys in his hands to other creditors. The plaintiff then obtained leave to bring this suit. The defendant, at the trial, requested that the jury be instructed to return a verdict in his favor on the ground that the plaintiff had no power to resell the property without the consent of the court. This motion was denied, and a verdict afterward returned for plaintiff for the full amount sued for. The defendant appealed.

R. Burnham Moffat, for the appellant.

Leopold Wallach, for the respondent.

**485** MARTIN, J. The sole ground upon which the general term reversed the determination of the trial court and directed a new trial was, that the plaintiff's assignor, having been served with the order appointing the defendant as receiver, could not sell the property, which was the subject of the contract of purchase and sale, without leave of the **486** court and thereby acquire any rights against the defendant, but that he was guilty of a contempt in making the sale, and, therefore, the court would not aid him to reap its fruits. This determination is based alone upon the defendant's exception to the refusal of the trial court to direct a verdict in his favor upon the grounds: 1. That the plaintiff's assignor had no power to sell the property without the consent of the court; and 2. That the sale was collusive. No effect was given to the last ground by the court below. It is plain that the evidence was insufficient to justify a direction of a verdict in favor of the defendant upon the ground that the sale was collusive. Nor was it sufficient to authorize the submission of that question to the jury.

Therefore, the only question involved on this appeal is that upon which the general term based its decision. It is well established by the decisions of this court that a vendor of personal property, when the vendee has declined to take the property and pay for it, ordinarily has the choice of any of three methods to indemnify himself against loss: 1. He may store or retain the property for the vendee and sue him for the entire purchase price; 2. He may sell the property and recover the difference between the contract price and the price obtained upon a resale; or 3. He may keep the property as his own, and recover the difference between the market value at the time and place of delivery and the contract price: *Dustan v. McAndrew*,



44 N. Y. 72, 78; *Lewis v. Greider*, 51 N. Y. 231, 237; *Hayden v. Demets*, 53 N. Y. 426, 431; *Cahen v. Platt*, 69 N. Y. 348, 352; 25 Am. Rep. 203; *Mason v. Decker*, 72 N. Y. 599; 28 Am. Rep. 190; *Quick v. Wheeler*, 78 N. Y. 305; *Porter v. Wormser*, 94 N. Y. 431, 442; *Ithaca etc. Works v. Eggleston*, 107 N. Y. 272, 276; *Tuthill v. Skidmore*, 124 N. Y. 148, 154; *Van Brocklen v. Smeallie*, 140 N. Y. 70. The plaintiff's assignor sought to avail himself of the second method, by selling the property at the best price he could obtain, and then recovering of the defendant the difference between the price thus obtained and the contract price.

<sup>487</sup> It is to be observed that in many of the cases cited it has been said that in thus selling the property the vendor acts as the agent of the vendee for that purpose. Clearly, the use of the words "as agent of the vendee" was not intended as a determination that the relation between the parties was that which ordinarily exists between a principal who owns property and an agent who may be authorized to manage or sell it. But it is a general expression which has been somewhat inaccurately used to define the right of a vendor to make a resale and hold the vendee responsible for his loss. It is quite manifest that a resale made under such circumstances is not made by the vendor strictly as the agent of the vendee, but he acts for himself in disposing of the property for the purpose of ascertaining the actual damages he may sustain. Doubtless in making it the vendor would be bound to sell within a reasonable time, to exercise good faith to effect a sale at the best price he could obtain, to follow any proper instructions the vendee might give as to the time and manner in which it should be made, and to give credit upon the contract price for the amount received. His duties in making the sale may, in some respects, resemble those of an agent, and thus the expression that he acts "as the agent of the vendee" has arisen. That he owes the vendee the duty to thus conduct the sale is clear, but that his acts in making it can be properly regarded as the acts of an agent, as that word is generally understood, is quite otherwise. Surely the fact that a vendor might seek this remedy against an insolvent or doubtful vendee, would not confer upon the latter such a title as would enable him to demand and hold the property without complying with the terms of the contract. To say then that the vendor becomes the agent of the vendee in making the sale is not quite correct, and is to be regarded at most as a mere fiction of law, and the beneficial title does not pass to the vendee.

The first case in this state which has come to our notice relating to this subject is *Sands v. Taylor*, 5 Johns. 395; 4 Am. Dec. 374. In that case the right to make a resale and hold the vendee <sup>488</sup> responsible for the difference between the contract price and the amount received upon a resale was considered and held to exist by a unanimous court. Several opinions were written. Some of the judges expressed the view that, after a vendee had refused to accept the property, the vendor became a trustee or agent by necessity to sell the property, but that the exercise of the right to sell was not a waiver of his rights under the contract. Others based this right, not upon any principle of agency, but upon the existence of a common usage, which was said to be convenient and reasonable and should be sustained by the courts. While the court unanimously held that the right of resale existed, there was some difference of opinion as to the precise language which should be employed in describing that right, or the principle upon which it was founded, some holding that it existed by virtue of a common usage which was sanctioned by the courts, while others were of the opinion that the vendor became an agent of the vendee by necessity. It is quite obvious that the language employed in that case has led to the use of the words "as agent for the vendee" in stating this rule in subsequent cases. When, however, we consider the manner in which the use of this phrase arose and the sense in which it was used, it becomes quite apparent that it was employed merely for the purpose of briefly describing the right which a vendor possessed to make a resale. It is clear that the court in that case did not hold, or intend to hold, that the general relation of principal and agent existed between the parties. But even if it could be regarded as proper in such a case to define the position of a vendee as that of an agent by necessity, yet, when the sense in which the term is used is understood, it is plain that it is not to be regarded as an assertion that the vendee becomes the absolute owner of the property by the act of the vendor in thus seeking to establish the amount of his actual loss. It would be manifestly unjust to hold that in such a case the title passed to a vendee, and that the vendor could not adopt this method of reducing the amount of his damage, and ascertaining the precise amount of his loss, without assuming the <sup>489</sup> risk which might follow if the title actually passed to the vendee without payment, upon the vendor's election to pursue that method of indemnifying himself. Moreover, even if it could be said that the title passed to the vendee, still the vendor

would retain his lien for the purchase price that could be foreclosed by a sale, and which would continue in the vendor not only the right of possession, but the right to sell and hold the defendant for any deficiency that might arise. Although a vendor may elect to pursue that method of indemnifying himself against loss, the title still remains in him to an extent which would prevent the vendee from demanding or recovering the property sold without complying with the provisions of the contract. Therefore, the general term erred in holding that the title to this property passed to the receiver, so that the vendor was unauthorized to pursue that method of ascertaining the amount of the loss for which the defendant should be held responsible without the consent of the court.

It is true that it has been held by this court that a sale of property under an execution without leave of the court, while the property is in the possession of a receiver, is illegal and void, although the levy was made before his appointment: *Walling v. Miller*, 108 N. Y. 173; 2 Am. St. Rep. 400. In that case it was said that persons having liens upon property had no right to interfere with its possession by a receiver without the authority of the court, and thus dissipate it and deprive the court of jurisdiction to administer it. It is, however, no authority to sustain the doctrine involved in the determination of the general term. In the case at bar the receiver had no possession nor right of possession, and no title to the property in question, but had only the right to receive the property purchased by the corporation upon paying the agreed price. No fund or property that had passed into the hands of the receiver was attempted to be disposed of or sold. The property had never come into the possession or fallen within the jurisdiction of the court appointing him. It continued the property of the plaintiff's assignor, subject only to the power of the receiver to take it upon paying the consideration. The right to do so <sup>490</sup> he absolutely declined to exercise. When he did that, the plaintiff's assignor was entitled to recover the damages which he sustained by reason of a breach of the contract. One of the methods of ascertaining their amount was a resale of the property. This was the method pursued. The defendant was given notice of the time and place of sale, and had every opportunity to protect any interest which the corporation or he, as receiver, had. The result of the sale, as well as its purpose, was to ascertain and establish the amount of damages the plaintiff's assignor in fact sustained.



Moreover, that the doctrine of *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400, has no application here is clearly established by the decision of this court in *Varnum v. Hart*, 119 N. Y. 101. In that case it was claimed by a receiver that a sale of the property of the corporation under an execution after his appointment was absolutely void, but this court held that, as the sheriff had seized the property and had it in his possession at the time of the appointment of the receiver, the sale was not void, but at most should be held simply voidable.

It appears to us that there is no question of contempt in this case. No right of possession in the receiver was disturbed, and the plaintiff's assignor only asserted a legal right which he possessed as to the property. Its resale was but the assertion of that right, and cannot be properly held to be illegal and void on the ground that leave of the court was not first obtained. In discussing a similar question in *Chautauqua Bank v. Risley*, 19 N. Y. 369, 376, 75 Am. Dec. 347, Comstock, J., said: "It may be that the creditor should ask leave of the court of chancery before he proceeds to sell, or that the purchaser acquiring the title should make a like application before he brings his ejectment. If, however, he fails to do so, the question is merely whether the court will consider him in contempt and punish him accordingly. The sale itself is but the assertion of a legal right, and it cannot be illegal and void on the ground that the leave of an equitable tribunal is not first asked and obtained." Hence, it would seem that even if the plaintiff's assignor was guilty of contempt, yet as the rights which <sup>491</sup> he pursued were legal, the fact that he failed to obtain the consent of the court did not render his action void. While the order appointing the defendant as receiver of the corporation enjoined all persons having notice from transferring any of its property, except to deliver it to him, still it is manifest that the corporation had no such possession of, or title to, the property in question as would make a resale of it by the vendor a disobedience of that order.

We think the learned general term erred in sustaining the exceptions and directing a new trial; that its order should be reversed and judgment is ordered to be entered for the plaintiff on the verdict of the jury, with costs to the appellant in all the courts.

All concur, except Parker, C. J., not sitting.

**SALES—REMEDIES OF SELLER FOR REFUSAL TO COMPLETE PURCHASE.**—The seller, upon refusal of the purchaser to

receive and pay for goods sold, may keep the goods and recover by proper action the difference between their value at the time and place of delivery and the contract price, or he may sell them with due precaution and diligence, and then sue for and recover the difference between the price received and the contract price; or he may, upon making an actual or constructive delivery of the goods, recover the full contract price: *Webber v. Minor*, 6 Bush, 463; 99 Am. Dec. 688. A resale is not, *per se*, evidence of the rescission of the contract, as the seller in making the resale is regarded as the agent of the buyer: *Grist v. Williams*, 111 N. C. 53; 32 Am. St. Rep. 782, and note; *Sands v. Taylor*, 5 Johns. 395; 4 Am. Dec. 374. See *Waples v. Overaker*, 77 Tex. 7; 19 Am. St. Rep. 727, and note.

**RECEIVERS—INTERFERENCE WITH POSSESSION OF.**—It is contempt of court for third persons to attempt to deprive a receiver of possession, whether by force or suit: *Walling v. Miller*, 108 N. Y. 173; 2 Am. St. Rep. 400; *Morrill v. Noyes*, 56 Me. 458; 96 Am. Dec. 486. He cannot be sued or garnished without leave of the court that appointed him: *People v. Brooks*, 40 Mich. 333; 29 Am. Rep. 534. But a court will not protect a receiver who attempts forcibly to take property from the possession of a stranger claiming title thereto, any farther than the law will protect him, where his authority to take possession of the property of which he is appointed receiver is not questioned: *Parker v. Browning*, 8 Paige, 388; 35 Am. Dec. 717, and note. Compare *Chautauqua County Bank v. Risley*, 19 N. Y. 369; 75 Am. Dec. 347.

## STABENAU v. ATLANTIC AVENUE RAILROAD COMPANY.

[155 NEW YORK, 511.]

**STREET RAILWAYS—LIABILITY FOR INJURING.**—A motorman in charge of an electric street railway car is not guilty of negligence in not stopping it when children are running across the track, if their position is such that they can safely cross, unless one of them falls or meets with some other unexpected accident. In the case of one of them falling, it is not until such fall that it becomes the duty of the motorman to stop the car.

**NEGLIGENCE—ERROR IN EXERCISE OF JUDGMENT.**—Where, in the event of a child falling on the track in front of an approaching street railway car, the motorman may use either the brake or a particular appliance to govern the electric motor power, and it is impossible to say which would be the more effective under the circumstances, the motorman cannot be adjudged guilty of negligence for using the one in preference to the other. His employers are not responsible for an error in the exercise of his judgment.

Eugene Lamb Richards, Jr., and Arthur L. Sherer, for the appellant.

Henry B. Johnson, for the respondent.

**512** GRAY, J. The plaintiff brought this action to recover for the loss of the services of his infant daughter, who was injured by a car of the defendant company, at a crossing in the township of New Utrecht, in the county of Kings. The **513**

plaintiff charged, in his complaint, that his daughter's injuries were due to the negligence of the defendant. He alleged that the crossing, in question, was dangerous to foot-passengers; that the construction and mechanical appliances of the car were imperfect, and that its operation at the time was negligent.

The evidence showed the following state of facts: The plaintiff's daughter was about seven years of age. At about seven o'clock in the evening of January 19, 1894, one of the defendant's trolley cars, on its way to Brooklyn, had left the station of Van Pelt Manor, with two motormen upon the front platform. When within less than one hundred feet of the crossing, where the accident occurred, several little girls were seen upon, or near, it. They were seen to start and to run over the crossing in front of the car. One of them, the plaintiff's daughter, fell and, immediately, the motorman applied the brake upon the car and brought it to a stop upon the crossing. The child's body was prostrate and outside of the track, at a point between the front and rear wheels. Upon raising up the child, examination showed that her foot and ankle had been struck by some part of the running gear and injured. Although there is no direct evidence as to how she had fallen, it might be inferred that her foot had been caught between the outside rail of the track and the plank of the crossing, with the effect that she had been unable to extricate it and was thereby thrown down. The crossing, upon which the child was injured, was used for traffic and the planks had become worn and broken in places. At the point where the child fell, there was a space between the outside rail and the adjoining plank of from two to three inches. There was a crossing for foot-passengers; but, for the purposes of this case, the child may be assumed to have been rightly upon the traffic crossing, and the question of the defendant's negligence is to be solved by the conduct of the motorman when approaching the crossing. Of the two men upon the front platform of this car, one was acting as instructor of the other, and he was the principal witness for the plaintiff. According to his testimony, the little girls were seen that evening at a distance of <sup>514</sup> from fifty to seventy-five feet away. As soon as they saw the headlight of the trolley car, they commenced to holloa and to run over the crossing in front of the car; when one fell down. As soon as that was seen to occur, the power was shut off and the brake applied upon the car. The car was going at the usual rate of speed, through a rural district, and, although it was possible to have stopped it before reaching the



crossing, there was, obviously, no occasion to do so, until the child was seen to fall. It is true that the motorman, who was at the brake, was new; but he was not inexperienced in the handling of cars, and the plaintiff's witness testified that he acted promptly and did the best he could with the brake. Indeed, according to his evidence, his companion, the motorman, started to apply the brake just as soon as he saw the children. His car appears to have been so well under control that, in what must have been but the briefest instant of time, after the fall of the child upon the crossing, he was able to bring it to a stop upon the crossing, and before its length had passed the child's body. How the motorman could have acted differently, it is difficult to see. No negligence was attributable to him, because he did not apply the brake before the child fell; for it was then, for the first time, that the peril became apparent. That was the principle of our decision in *Fenton v. Second Avenue R. R. Co.*, 126 N. Y. 625. In that case, the child, while running across the street in front of a car, fell and was killed by the car passing over his body. It was observed, in the opinion, to the effect that the driver of the car, when he saw the boy approaching the track, had the same reason to suppose that he would get across that he had, and that the boy probably would have crossed in front of the horses in safety, if he had not fallen. It may be observed in the present case, if the little girl had not run she probably would not have fallen, and if she chose to run across in front of the car, it was because she believed it was possible to do so. The motorman had the same right to believe so, and it was the fact, as shown by the other little girls having passed over in safety. Nothing required of this little girl that she should run over <sup>515</sup> the crossing in front of the car. She might have waited for the car to pass; but having preferred to run with her companions, she could have reached the other side of the track, if she had not fallen. Whether her fall was from her foot being caught, or from merely tripping, is not definitely known; nor is it, perhaps, material upon the question of the defendant's negligence; because, until she was seen to fall, the motorman was under no obligation to bring his car to a stop. It was essential, in this case, to show that the defendant's servant, while engaged in the operation of the car, committed some act which he ought not to have done, or omitted some act incumbent upon him. As I regard the case, I fail to discover wherein any negligence was attributable to the defendant which was the proximate cause of the accident. Nor

can negligence be predicated upon the use by the motorman of the brake, instead of the particular appliance used to govern the electrical motive power. In the emergency, one of two courses was open to him, and it is impossible to say that the one adopted was not as effectual as the other, under the circumstances. It appears by the evidence that a sudden reversal of the electric power sometimes operates, as the plaintiff's witness said, "to blow out the fuse"; in which case, the power to control is lost. The motorman testified to having heard of that happening often. Whether the one or the other means provided for stopping the car should have been adopted, was a matter for the exercise of the motorman's judgment, and, though newly employed, he was not shown to be incompetent. For an error in its exercise, the defendant could not be held responsible. Even the failure to have exercised the best judgment would not have been evidence of negligence: *Bittner v. Crosstown Street Ry. Co.*, 153 N. Y. 76; 60 Am. St. Rep. 588; *Wynn v. Central Park etc. R. R. Co.*, 133 N. Y. 575.

I think the evidence was altogether insufficient to hold the defendant responsible for this accident, and, therefore, that the judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur, except Bartlett and Vann, JJ., dissenting.

**STREET RAILWAYS—DUTY OF MOTORMAN—LIABILITY OF COMPANY.**—It is the duty of the motorman in charge of an electric street-car, not only to see that the track is clear, but also to exercise constant watchfulness and care for persons who may be approaching the track: *Barnes v. Shreveport City R. R. Co.*, 47 La. Ann. 1218; 49 Am. St. Rep. 400. He has a right to assume that people will not suddenly undertake to cross in front of the car: Monographic note to *Barnes v. Shreveport City R. R. Co.*, 49 Am. St. Rep. 422; *Driscoll v. Market Street etc. Ry. Co.*, 97 Cal. 553; 33 Am. St. Rep. 203, and note. But he must maintain such control of his car as is practicable: *Anderson v. Minneapolis Street Ry. Co.*, 42 Minn. 490; 18 Am. St. Rep. 525; and while there can be no recovery where a child runs in front of a cable-car and is injured without negligence on the part of the gripman: *Winters v. Kansas City etc. Ry. Co.*, 99 Mo. 509; 17 Am. St. Rep. 591; there may be if the gripman was not attending to his business at the time: *Schnur v. Citizens' Traction Co.*, 153 Pa. St. 29; 34 Am. St. Rep. 680. The company should not be held liable for the gripman's error of judgment in a sudden emergency: *Bittner v. Crosstown Street Ry. Co.*, 153 N. Y. 76; 60 Am. St. Rep. 588. See *Evers v. Philadelphia Traction Co.*, 176 Pa. St. 376; 53 Am. St. Rep. 674, and note.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**OHIO.**

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**TOLEDO AND OHIO CENTRAL RAILWAY COMPANY v.**  
**BOWLER AND BURDICK COMPANY.**

[57 OHIO STATE, 38.]

**CARRIERS—LIABILITY FOR GOODS AS BAGGAGE.—**

While a carrier of passengers is not obliged to accept anything but ordinary baggage as baggage, yet, if without extra compensation, and knowing that it is not personal baggage, he permits it to be treated, and carried as such, he is liable for its loss through negligence.

**CARRIERS—LIABILITY FOR MERCHANDISE CARRIED AS BAGGAGE.**—If a carrier of passengers, for the purpose of obtaining patronage, and with actual knowledge of all the material facts, waives its right to refuse merchandise which it is requested to carry as baggage, or to make an additional charge commensurate with the increased risk, and carries it as baggage, it cannot, after a loss has occurred, assert an immunity from liability because of such right.

Action to recover the value of merchandise in trunks and cases which the railway company had received and undertaken to carry as baggage of the salesmen of plaintiffs, who were passengers on the company's train. The trunks and cases were destroyed in a collision. Judgment for defendant in the trial court. This judgment was reversed by the circuit court. Defendant appealed by writ of error.

Doyle & Lewis, Taylor, Taylor & Taylor, and Bargar & Bargar, for the plaintiff in error.

Powell & Minahan and Gilbert & Hills, for the defendants in error.

<sup>55</sup> SHAUCK, J. Much of the doctrine maintained by counsel for the carrier is established law. The <sup>56</sup> obligation of the



carrier to carry the baggage of a passenger is limited to those articles which are for his personal comfort and convenience. Nor is the carrier bound to inspect a trunk presented by a passenger as baggage to see whether it contains articles of merchandise. In the absence of knowledge to the contrary, it may rely upon the passenger's implied representation that its liability will be limited to baggage. Since it does not owe the duty of inquiring as to the contents of such trunks as are so presented, it cannot be charged with the knowledge which inquiry might have elicited. Nor can the liability of the carrier be extended by the fraud and deceit of the passenger. A claim founded on his own fraud and deception would be as bad in law as it is in morals.

But it does not appear from these records that any of these views were denied by the common pleas court of Franklin county, or by either of the circuit courts. It cannot be said that one is deceived or defrauded with respect to facts which are made known to him in any way. In two of these cases the jury were instructed that to charge the carrier with liability for the merchandise as baggage, it was necessary to show that its agents knew the character of the contents of the trunks when they received and checked them. In the other case, the evidence tended to show that the agent had such knowledge.

The instruction given placed upon the plaintiff the burden of proving such knowledge. The instruction was not that the carrier would be liable if its agents might have known that the trunks contained merchandise, or if they had reason to know; for that would have defined a rule too uncertain of application. The charge required that <sup>57</sup> the evidence, circumstantial and direct, must affirmatively show that the carrier's agents knew that merchandise was received to be carried as baggage.

That such knowledge fixes upon the carrier the same liability for merchandise accepted to be carried as baggage as though it were baggage, is generally, though not universally, held. The general rule upon the subject of waiver as affecting the liability of the carriers was stated by Mr. Justice Field in *Hannibal R. R. Co. v. Swift*, 12 Wall. 262, as follows: "If at any time reasonable ground existed for refusing to receive and carry passengers for transportation, and their baggage and other property, the company was bound to insist upon such ground if desirous of avoiding responsibility. If not thus insisting, it received the passengers and their baggage and other property, its liability was the same as though no ground for refusal had ever existed."

In 3 Wood on Railroads, page 1806, it is said: "While a carrier is not obliged to accept anything but ordinary baggage as baggage, yet if, without extra compensation, and knowing that it is not personal baggage, he permits it to be treated and carried as such, he is liable for its loss." The same doctrine was declared and applied in *Jacobs v. Tutt*, 33 Fed. Rep. 412, and in numerous cases cited in the briefs. Nothing opposed to this view is held in *Humphrey v. Perry*, 148 U. S. 627, relied on by counsel for the company; for not only does the court, by distinguishing *Jacobs v. Tutt*, 33 Fed. Rep. 412, recognize that case as correctly decided, but in the opinion it is stated as a reason for the conclusion that the carrier was not liable for the value of merchandise received to be carried as <sup>58</sup> baggage that the witness "testified to no fact from which the inference could be drawn that the agent had actual knowledge that the trunk contained a stock of jewelry."

Nor is the view stated in conflict with the cases in which it is held that the carrier does not become liable for merchandise received as baggage merely because it had frequently so received it, nor merely because of the peculiar appearance of the trunks or cases in which it was contained; for fraud cannot be practiced upon a carrier so frequently as to create a cause of action against it, nor is proof of a circumstance which tends to show knowledge, or which might excite a suspicion, necessarily equivalent to proof of actual knowledge. Concerning the effect of such circumstances it was said by this court in *Johnson v. Way*, 27 Ohio St. 374, as a reason for rejecting the ancient rule that there could be no recovery upon a negotiable instrument, void between the original parties, if the holder had acquired it under circumstances calculated to excite suspicion:

"Circumstances which might excite the suspicion of one man might not attract the attention of another. It is a rule which business men cannot act upon in the ordinary affairs of life with any certainty that they are safe." It was nevertheless held that good faith required the holder to act upon his knowledge.

It is true that in cases not distinguishable from those before us, the supreme court of Massachusetts has exempted the carrier from liability for the merchandise, holding that notwithstanding its knowledge of the character of the articles to be carried, it is liable only according to the terms of <sup>59</sup> its contract, and that the articles of merchandise were carried at the risk of the passenger.

If we were inclined to adopt this view instead of that which

obtains generally, we should find difficulty in distinguishing *United States Exp. Co. v. Backman*, 28 Ohio St. 144, where a common carrier of freight was charged with the consequences of its knowledge that the value of the freight exceeded that which was stated in the bill of lading. It would not seem practicable in this respect to distinguish between the carriage of freight and the carriage of baggage, nor between knowledge of the value of the articles carried and knowledge of their character. In one case as clearly as in the other, considerations of public policy justify the conclusion that if the carrier, for the purpose of obtaining patronage, and with actual knowledge of all the material facts, waives its right to refuse merchandise which it is requested to carry as baggage, or to make an additional charge commensurate with the increased risk, it cannot, after a loss has occurred, assert an immunity from liability because of such right. Regarding other points raised by counsel for the company, it seems sufficient to say that they present no prejudicial error.

Judgment affirmed.

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**CARRIERS—LIABILITY FOR ARTICLES RECEIVED AS BAGGAGE.**—If articles are presented to a carrier by a passenger who demands their transportation as his luggage, and the carrier is informed by the passenger, or has knowledge from the outward appearance of the articles, that they are not usually carried as baggage, but receives and carries them as such, he is answerable for them as baggage, although he was not bound to receive them as such: *Kansas City etc. Ry. Co. v. McGahey*, 63 Ark. 344; 58 Am. St. Rep. 111, and note; *Railway Co. v. Berry*, 60 Ark. 433; 46 Am. St. Rep. 212, and note; *Oakes v. Northern etc. R. R. Co.*, 20 Or. 392; 23 Am. St. Rep. 126, and note. Merchandise is not baggage, but if there is no concealment on the passenger's part, and a carrier receives and treats as baggage a package which he knows to be merchandise, he is held liable in case of loss, although no extra compensation was charged for its transportation: Monographic note to *Hutchings v. Western etc. R. R.*, 71 Am. Dec. 160, 161; note to *Blumantle v. Fitchburg R. R. Co.*, 34 Am. Rep. 380.

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## GATES v. TIPPECANOE STONE COMPANY.

[57 OHIO STATE, 60.]

**CORPORATIONS FORMED BY PARTNERS—FRAUD UPON CREDITORS—LIABILITY ON SUBSCRIPTIONS.**—If partners, under agreement, capitalize their partnership property at twice its value, organize a corporation with a capital stock of that amount, transfer such property to it at this estimated value, and, in payment of the property, issue to themselves paid-up corporate stock to an amount equal to such estimated value, make themselves officers of the corporation, continue the partnership business in the



corporate name, and subsequently become insolvent, such transaction is a fraud on subsequent innocent creditors of the corporation, although no evil intent accompanied the transaction, and the difference between the actual and inflated value of the property so conveyed must be deemed unpaid subscriptions upon the stock issued in this way whenever necessary to protect the rights of such corporate creditors.

Day, Lynch & Day, and R. A. Harrison, for the plaintiff in error.

D. A. Hollingsworth and W. A. Bateman, for the defendants in error.

<sup>72</sup> BRADBURY, J. The only question which this opinion will consider relates to the liability of James H. McLain upon his subscription to the capital stock of the Tippecanoe Stone Company. The court of common pleas held him liable and its holding was sustained by the circuit court. This holding rests upon a finding of fact made by a referee to whom the cause was, by order of the court of common pleas referred, with directions to hear the evidence and report his findings of fact made thereon, separate from his conclusions of law. A brief reference to so much of this finding as relates to the question now under consideration will be made.

McLain, William Thornburg, and Oscar Townsend, in the year 1887, owned and were operating, as partners, a certain stone quarry, stone sawmills, etc., at Tippecanoe, Harrison county, in this <sup>73</sup> state; McLain owning one-half, the two other partners each one-fourth. The fair value of partnership property was \$37,500. The partners entered into an agreement among themselves to capitalize this property at an estimated value of \$75,000, organize a corporation with a capital stock of \$75,000, transfer the property to it at this estimated value, and in payment of the property issue to themselves paid-up corporate stock to an amount equal to this estimated value. Accordingly, steps were taken to accomplish this end, which resulted in the incorporation of the Tippecanoe Stone Company, under the laws of this state with a capital of \$75,000. At once, upon the completion of its organization, the partnership property was transferred to the corporation at the price previously fixed, and in exchange therefor, the entire stock of the corporation was issued to the partners, or their assignees, as fully paid up. The business was conducted by the corporation for about two and one-half years, when it became insolvent, and by force of an assignment under the insolvent laws, passed into the hands of Thomas A. Latta as trustee for the benefit of creditors, who

now seek to recover of James H. McLain, as unpaid subscription upon the stock issued to the latter, the difference between the par value of that stock and the value of the property transferred by him for its payment.

The capital stock of the corporation was \$75,000, which, being divided into shares of \$100 each, aggregated 750 shares. McLain, as he owned a moiety of the partnership property, was, under the agreement to capitalize it as before mentioned, entitled to receive one moiety of the corporate stock, or 375 <sup>74</sup> shares; he, however, assigned the right to receive 100 of these shares to another, so that in the division of the shares only 275 of the par value of \$27,500 fell to him. The value of the partnership property being only \$37,500, just one-half the sum at which it was capitalized, it follows that McLain, in payment for 275 shares of stock of the par value of \$27,500, transferred to the corporation property having only one-half that value, or of the actual value of \$13,750 only. This entire transaction was found to have been conceived and conducted in good faith, that is, without any purpose to defraud those who, by dealing with the corporation, might subsequently become its creditors, or any one else.

The constitution of 1851, and the statutes passed since its adoption, evince great solicitude for corporate creditors. Their security has become, in a certain sense, a part of the public policy of the state. The subject was regarded sufficiently important by the convention that framed our present constitution to merit special attention; accordingly section 3 of article 13 of that constitution provides that "dues from corporations shall be secured by such individual liability of the stockholders, and other means as may be prescribed by law; but in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock." Subscriptions to the stock of a corporation are prima facie payable in money. Neither the constitutional provision on the subject of corporate dues nor the statutes of the state contemplate any other mode for their payment. Notwithstanding <sup>75</sup> all this, however, we do not wish to be understood to deny to corporations, created under the laws of this state, the power to exchange their stock for specific property. Many cases may be conceived where such an exchange would be for the benefit of the corporation; or even if not ultimately advantageous to the corporation, yet being made between the corporation and one who dealt with it at

arm's length and in good faith should be deemed binding upon both parties.

The question has received the attention of many able courts, and decisions, respecting the circumstances under which a corporation may receive something else than money in payment of subscriptions to its stock, have not been harmonious. In quite an early day this court held that "an agreement attempting to secure any stockholder the privilege of paying up subscriptions in store goods or otherwise, except in money, will be treated as a fraud upon other stockholders, and payment in money enforced": *Henry v. Vermillion etc. R. R. Co.*, 17 Ohio, 187. If such an arrangement is a fraud upon other stockholders, it would seem to be equally so as to corporate creditors. In *Noble v. Callender*, 20 Ohio St. 199, it was held: "A subscriber for shares of stock in a railroad company which is not authorized by the law to receive land in payment for its stock cannot, in an action against the stockholders of the company, by its creditors, set up or avail himself of the benefit of a collateral agreement between himself and the company, to the effect that the amount of his subscription was to be paid in land."

In this case the contract to pay the subscription in land was contemporaneous with the subscription, <sup>76</sup> and the subscription would not have been made had it not been payable in this way, and yet it was not allowed to prevail.

The cases under consideration present an aspect much more favorable to creditors than either of the two cases above noticed possessed. It is only by a fiction of law that it can be claimed that any contract whatever was made between the corporation and McLain respecting this exchange of its stock for his interest in the partnership property. The finding of fact shows that he subscribed for 275 shares of the capital stock of a par value of \$27,500. The obligation imposed upon him by this subscription was to pay for it in money at its par value. There were but five stockholders of which he was one, he must have been a director of the corporation, and the finding shows he was at the time its president. On the same day that he made his subscriptions, and it would seem contemporaneously with it, the entire number of shares he had subscribed was issued to him as fully paid up, the sole consideration being the transfer to the corporation of the partnership property. No negotiations of any kind appear to have been had between him and the corporation. Whatever contract was made between them re-



sulted not from any negotiations, but from their acts. On the same day, and the inference is, at the same time, he subscribed for the stock, transferred his interest in the partnership property to the corporation, and in exchange therefor received fully paid-up shares of stock to the number he had subscribed, the par value of which was just double the property he transferred to it. Doubtless the inference to be drawn from this transaction is that the corporation agreed to accept <sup>77</sup> his interest in the partnership property in full payment of the shares of its stock he had subscribed, and it is equally inferable from this transaction that he would not have subscribed for these shares had the subscription not been so payable. However, the utmost formality would have added no sanction to such an agreement. The directors might have formally voted to buy this property at the estimated price and to issue paid-up shares of its stock in payment, and entered upon their minutes a resolution to that effect. Nevertheless, the courts would sweep aside these formal acts and view the transaction as it actually occurred, when it would have appeared that it was the result, not of any actual negotiations between him and representatives of the corporation, but of a previous contract made by the three partners among themselves, by which the partnership property was to be estimated at double its actual value, a corporation formed, and this property transferred to it at this inflated value, and fully paid-up shares of stock issued to the partners, or as they might direct, in the proportion that they were interested in the partnership property.

Although this may all have been done in the utmost good faith, and without an evil intention towards those who, by subsequently dealing with the corporation, might become corporate creditors, nevertheless the fact remains that these incorporators held out to the world that the concern they had created and represented had a fully paid-up capital of \$75,000, whereas, in fact, its capital was one-half that sum only. They might have honestly believed that a career of prosperity lay before the enterprise which they had thus launched upon the commercial world; yet they cast upon others a <sup>78</sup> considerable share of the risks that might attend it. Notwithstanding the frequency with which corporations are created with fictitious capital, persons who have occasion to deal with those organized under the laws of this state and doing business within its borders are not bound to anticipate this condition of its affairs, but may assume that it is what it purports to be.

This attempt by McLain and his associates to dispose of their property at a fictitious or inflated value, to a corporation of their own creation—one designed, and brought into existence, chiefly for that purpose—should be regarded as a fraud upon the subsequent creditors of the concern, although no evil intent accompanied the transaction and the difference between the actual and the inflated value of the property so conveyed should be deemed unpaid subscription upon the stock issued in this way whenever necessary to protect the rights of the corporate creditors. What might be the rights of a creditor who, with full knowledge of the acts of these corporators, and of the inflated value of the property transferred to the corporation, choose to extend credit to the concern, we need not inquire, for that question is not raised in the record.

Judgment affirmed.

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**CORPORATIONS—STOCK ISSUED FOR OVERVALUED PROPERTY—RIGHTS OF CREDITORS.**—If property contributed or paid for the capital stock of a corporation is not valued in good faith, a stockholder may be compelled to respond to the creditors of the corporation for the par value of the stock, less the actual value of the property taken in exchange for it: *Coleman v. Howe*, 154 Ill. 458; 45 Am. St. Rep. 133; *Wishard v. Hansen*, 99 Iowa, 307; 61 Am. St. Rep. 238, and notes. While a margin will be allowed for honest differences of opinion as to such value, deliberate and intentional overvaluation is not permissible: *Elyton Land Co. v. Birmingham Warehouse etc. Co.*, 92 Ala. 407; 25 Am. St. Rep. 65, and note; and fraud will be presumed where the value of such property is well known, or might have been easily learned, and it has been taken at an exaggerated valuation: *Coleman v. Howe*, 154 Ill. 458; 45 Am. St. Rep. 133. See monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 818-820.

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## JONES v. COMMISSIONERS OF LUCAS COUNTY.

[57 OHIO STATE, 189.]

**OFFICERS—RIGHT TO EXTRA COMPENSATION.**—An officer whose fees are regulated by statute, can charge fees for those services only to which compensation is by law affixed, and if a service for the benefit of the public is required, and no provision for payment therefor is made, it must be regarded as gratuitous, and no claim for compensation can be enforced.

**OFFICERS—RIGHT TO EXTRA COMPENSATION.**—When a duty is enjoined upon a public officer, and no compensation therefor is provided by statute, the presumption is that the service is intended to be gratuitous, or that compensation is to be regarded as covered by fees in other matters, or by salary, or by both.

**OFFICERS—EXTRA COMPENSATION.**—A county officer is not entitled to compensation in addition to his salary for making a report for county commissioners of their financial transactions re-

quired by statute, or for other services not enumerated in statutes providing for extra compensation. Such services must be deemed to be gratuitous, or to have been done in consideration of the salary attached to the office.

**OFFICERS—AUTHORITY OF COUNTY COMMISSIONERS.**—County commissioners have only special powers and represent the county in respect to its financial affairs, only in such matters as are distinctly provided by statute. They may pass upon claims, which for some amount are the subject of legal demand against the county, but their finding of jurisdiction is not conclusive of the fact, and they are wholly without authority to allow or sanctify an illegal demand upon the county, and such allowance is not binding thereon.

**OFFICERS—BREACH OF BOND—LIABILITY OF SURETIES.**—The drawing of money from the county treasury by a county officer upon his own official warrant, based upon an illegal and unauthorized allowance by a board of county commissioners of his claim for fees and extra compensation, is a breach of his official bond, and renders his sureties liable to the county for the amount so drawn.

Action to recover back money received by county officers as compensation for extra services. Judgment for plaintiff, and the defendants appealed by writ of error.

W. H. A. Read, B. F. Jones, and McElroy & Carpenter, for the plaintiff in error.

C. E. Sumner, and Coyner & Poppleton, for the defendants in error.

**206** SPEAR, J. The first-entitled case was argued orally to the second division only, but both cases were submitted to and considered by the whole court.

In the case of Jones, auditor, but one question is made by the record, and that is made also in the other case. It is this: Is a county auditor entitled to extra compensation from the treasury of the county for services in making for the commissioners the report of their financial transactions, required by section 917 of the Revised Statutes?

Provisions of the statutes bearing on the subject are: "Sec. 917. The county commissioners, annually, on or before the third Monday in September, shall make a detailed report in writing to the court of common pleas of the county, of their financial transactions during the year next **207** preceding the time of making such report." In case of neglect to make such report, the commissioners are subject to a fine of one hundred dollars, to be enforced by the prosecuting attorney.

"Sec. 1021. The auditor, by virtue of his office, shall be secretary of the county commissioners, except as otherwise provided by law; he shall aid them, when requested, in the per-



formance of their duties; he shall keep an accurate record of all their proceedings, and shall carefully preserve all documents, books, records, maps, and papers to be deposited and kept in his office.

"Sec. 850. The clerk shall keep a full and complete record of the proceedings of the board, and a general index thereof. He shall read the minutes of meetings; he shall certify to the record, etc."

Sections 1069 and 1070 provide a salary to county auditors from eight hundred dollars to four thousand four hundred, depending upon population.

Sections 1071, 1072, 1073, 1074, 1075, and 1076, provide further compensation for services in special matters therein enumerated, but none of them relates to the subject of inquiry here.

"Sec. 1077. All claims for services of the county auditors, which are payable from the county treasury, shall be made out in detail according to the rates named in the foregoing sections, and shall be presented to the county commissioners, who, after being satisfied that the labor has been performed, shall allow said bill or claim, and cause the same to be spread upon the minutes of the board; and, after being so allowed, the county auditor is authorized to draw his warrant upon the treasurer of the county for the amount of the bill or claim so allowed."

<sup>208</sup> "Sec. 1078. The fees and compensation provided for by the foregoing sections shall be in full for all services lawfully required to be done by the auditors of such counties; and it shall be unlawful for any county auditor to charge or receive any other or further fee or compensation, either as clerk of any board or for any services rendered by him."

"Sec. 894. No claim against the county shall be paid otherwise than by the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some person or tribunal, in which case the same shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the same; but no public money shall be disbursed by the county commissioners, or any of them, but the same shall be disbursed by the county treasurer, upon the warrant of the county auditor, specifying the name of the party entitled to the same, on what account, and upon whose allowance, if not fixed by law."

While these sections may be somewhat obscure as to some

features of the law, two propositions appear to us to suggest themselves as rational deductions: 1. That there is no provision on which the auditor can found a valid claim for payment from the county treasury for making the commissioners' report; 2. That there is no authority given the commissioners to contract for the making of their report and order the services paid from the treasury of the county. When, to the foregoing, we have added the rule, well established in this state, as held in *Debolt v. Trustees*, 7 <sup>209</sup> Ohio St. 237, that "an officer whose fees are regulated by statute, can charge fees for those services only to which compensation is by law affixed," and the corollary, as held in *Anderson v. Commissioners*, 25 Ohio St. 13, that "where a service for the benefit of the public is required by law, and no provision for its payment is made, it must be regarded as gratuitous, and no claim for compensation can be enforced," which rule is more fully stated, but to like import, in *Strawn v. Commissioners*, 47 Ohio St. 404, the conclusion inevitably follows that the auditor's services in making the report for the commissioners must be deemed, if not gratuitous, at least satisfied, by the salary attached to his office, and that he is not entitled to extra compensation for such services, payable out of the county treasury. And this conclusion follows, whether the sections quoted impose the duty on him to make such report, or devolve it primarily upon the commissioners, the duty of the auditor being only a general one to aid them, a question which it is not necessary to decide in order to dispose of the case.

A question much argued, whether or not there can be a recovery back by the commissioners, we think does not arise upon the record in this case, because of the agreement of the parties embodied in the submission that if the allowance is found not to be regular and proper under the law, judgment is to go against the defendant.

In the case of *Lewis v. State*, the demurrer raises not only the question as to the right of the auditor to be compensated for the services stated, but as to the sufficiency of the pleading in other respects, and especially whether there is <sup>210</sup> sufficient allegation of the illegal character of the acts of the auditor which form the ground of complaint. The rule is well understood that it is only facts which are well pleaded that are admitted by a demurrer, and that, in general, an averment that a defendant unlawfully received money on an account would be insufficient. But we have here a showing that the party complained of was a county auditor; that the alleged services which

formed the ground of the claim appeared to have been rendered in his official capacity, and were charged against the county, and payment for them received from the county's treasury on the allowance of the commissioners. It would seem that, under our liberal rules respecting the construction of pleadings, enough is averred to raise the legal question whether such obtaining of the county's money by a county officer is or not lawful, and if unlawful, that judgment might properly follow, if otherwise the action could be maintained. That is, concede that the word "unlawfully" imports a legal conclusion rather than an allegation of fact, and adds nothing to the pleading, and concede farther, that the services charged had been rendered and the charge as to amount was reasonable, and that the claim had been allowed by the commissioners, still was it, in view of the statute law, the law of which the court must take notice and which it must apply to the facts, a lawful receiving of the county's money or not? The petition was, we think, in this respect, sufficient as against a general demurrer.

In considering the substance of the first, second, third, fourth, fifth, sixth, seventh, and ninth causes of action, we have examined all the citations, statutory and other, given in the briefs, with many <sup>211</sup> additional, and are satisfied that the statutes furnish no support for the auditor's charges set out in these causes of action. The claims challenged by these allegations of the petition are founded upon charges for services in matters, some of which belong among the duties of other officers, and some, although among the duties of the auditor, are not proper subjects of extra charge against the county. As to the former, the holding of the courts below is justified on the ground, that, ordinarily, an officer cannot ask pay from the county for performing services which belong to another officer to perform. As to the latter, it is plain that no extra compensation is provided by statute, at least, not clearly so, and the holding rests satisfactorily upon the ground, heretofore stated, that fees are not allowed upon an implication, and where the duty is enjoined and no compensation is allowed, the presumption is that the service is intended to be gratuitous, or that compensation for it is to be regarded as covered by fees in other matters, or by salary, or both: *Debolt v. Trustees*, 7 Ohio St. 237; *Anderson v. Commissioners*, 25 Ohio St. 13; *Strawn v. Commissioners*, 47 Ohio St. 404.

The subject matter of the eighth cause has been disposed of in discussing the other case. We now reach the inquiry as to the



effect of the allowance by the commissioners, and the question of recovery against the auditor and his bondsmen. It is urged that, as a condition of avoiding that conclusive effect of the commissioners' allowance, there must be shown either fraud or mistake, and neither is averred. This claim seems to rest upon the idea that the board of commissioners is practically the county, and that its official acts necessarily conclude the county. The assumption <sup>212</sup> is fallacious. The legal status of a county and the relation of the commissioners to it are well defined in *Commissioners v. Mighels*, 7 Ohio St. 119, 120: "Counties are local subdivisions of a state created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit it; . . . a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. . . . The idea that the board of county commissioners is the agent of the county, or of its people, is prominently advanced and pressed on our attention. That board is, in some sort, the agent of the county, it is true, inasmuch as it alone is authorized to sue and be sued in respect to contracts growing out of the county organization. . . . But, it is said, the members of the board of county commissioners are chosen by the electors of the county, and hence the board is to be regarded as the agent of the county for whose torts in the performance of official duties the county ought to be responsible. True, the people of the county elect the board of county commissioners; but they also elect the sheriff and treasurer of the county. Are the people of the county, therefore, responsible for the malfeasance in office of the sheriff, or for the official defalcations of the county treasurer?"

But, it is insisted, the board of commissioners is a body corporate, and whether it is treated as <sup>213</sup> the county or not, it stands in place of the county as to its acts relating to the public; that, besides, when it sits to act upon claims against the county its functions are judicial, and that, appeal being provided, that is the remedy for one aggrieved by its action. If we concede, as we may, that the board is, in a limited way, and for special purposes, a body corporate, that is, a quasi corporation, and, farther, that it acts in a judicial, or quasi judicial, capacity, and that when it adjudicates a claim which it is authorized to consider, appeal is the remedy, still we are at the threshold of

the inquiry, for the ultimate question is one of power to act in this particular matter.

"A grant of power to such a corporation must be strictly construed, and when acting under a special power, it must act strictly on the conditions under which it is given": Treadwell v. Commissioners, 11 Ohio St. 190. The grant of power to commissioners to pass upon claims is given in sections 1077 and 894, heretofore quoted, and is a very narrow one. The former section is to the effect that all claims for services of the auditor, which are payable from the county treasury, shall be made out in detail according to the rates fixed by statute, and presented to the commissioners, who, if satisfied that the labor has been performed, shall allow the bill, etc., and then the auditor is authorized to draw his warrant. That is, the right to present depends upon whether the claim be one the rate of which is fixed by statute, and upon whether the claim for some amount may be legally paid from the county treasury. Both conditions must concur. But if the rate is not so fixed, or if the claim is not legally so payable, no right to present it is given, and there is force in <sup>214</sup> the proposition that if no right to present be given, then no power to allow could be implied, and if no power to allow, then the attempted allowance would be a nullity. Section 894, which regulates the allowance of claims other than those of the auditor, is to the effect that, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal, no claim against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor. The word "claim," as used in these statutes, we think naturally imports a matter of charge which is based upon some statute, or grows out of the performance of some authorized contract, wherein the inquiry of the commissioners as to the auditor is confined to whether or not the service was rendered, and, as to other claims, to determine the amount due, as contrasted with a mere demand unsupported by law. Respecting the latter class of demands, it would follow that the board is without authority to consider them. That is to say, referring to claims other than those of auditors, if the amount due is fixed by law, or is to be fixed by some other tribunal, then the commissioners may not act, but if the amount be not fixed in one of the other ways enumerated, then the demand being one which may form the basis for a claim, the commissioners may fix the amount; it is the amount only which they

determine; and in respect to claims by auditors, coming under section 1077, the commissioners, if satisfied that the services have been rendered, must allow the claim. The question is, Has the auditor done the work? If no, refusal; if yea, allowance; but in all cases conditioned that the demand shall have a <sup>215</sup> legal basis. This is very far from authority to order payment of a demand which cannot have, for any amount, the sanction of law. This construction appears to give reasonable effect to a succeeding section (896) respecting appeals, while a different construction would, we think, defeat the spirit of that section. A party aggrieved may appeal to the common pleas within fifteen days upon giving written notice to the commissioners, or the auditor. An auditor whose demand had been ordered paid in full, as in the present case, would hardly agitate the question of appeal, and no one else could. So that, if the commissioners should entertain a demand wholly unfounded in law, and allow it, and their action upon such unfounded claim should be treated as final unless appealed from, the people's money would be gone and they without remedy. On the other hand, if the commissioners should refuse to act on the ground of want of power, and a party feel aggrieved at the refusal, mandamus would test whether that refusal was justified or not; *State v. Commissioners*, 26 Ohio St. 364. If the decision of the commissioners in refusing to act should be sustained, that would end the controversy, while if overruled, and that body ordered to pass upon the case, the party, if aggrieved at the action taken, might then appeal. This construction protects the interests of the people, as well as those of private parties. Nor does it conflict with the doctrine announced in *Shepard v. Commissioners*, 8 Ohio St. 354, cited in argument. In that case, the claim of the recorder, the subject of controversy, was for making indexes, and the point decided is that the recorder could not bring assumpsit against the county, but his only remedy was <sup>216</sup> by appeal from the adverse judgment of the commissioners. But the recorder's claim was based upon a contract which the commissioners had authority to make. He had, therefore, a valid claim for some amount, and the jurisdiction of the commissioners to pass upon it is unquestionable.

Giving this construction to the statutes, we conclude that the board, being a creature of statute, an agent whose powers are not general, but special, should be held to represent the county in respect to its financial affairs only in such matters as are distinctly provided by statute. Authority is thus given to it to



entertain and pass upon claims, which, for some amount, may be the subject of legal demand against the county. Its jurisdiction being thus necessarily limited, is not of such a character as to permit a finding of jurisdiction by the board to be conclusive of the fact. Speaking more specifically, the board may properly pass upon a question whether in fact a given service has been rendered, and upon the amount which ought to be paid upon an unliquidated claim, where in law a claim may exist, i. e., where it has a legal basis on which to stand. But it is wholly without authority to sanctify a demand illegal because of being upon a subject which can admit of no claim, and thus give away the people's money. It can no more do so than can any other agent bind his principal by acts unauthorized because without the scope of his authority.

From this it would follow that recovery does not necessarily depend upon an allegation and showing, as ground of recovery, of fraud or mistake. True, it would be natural to assume that the board, when it approves a wholly unfounded claim, acts under a mistake of some kind. But <sup>217</sup> this we think not essential, inasmuch as the weakness arises not so much from a mistaken understanding of facts, or indeed a mistaken application of law, as from want of power to act at all. The cases at bar are essentially different in their facts, and we think in the principle of law involved, from that of *Commissioners v. Noyes*, 35 Ohio St. 201, cited in argument. There the case made by petition and answer left the inference that the contract for the work done for the county was within the power of the commissioners and legal, and the holding is, that there could be no recovery back at the suit of the commissioners without a showing of fraud or mistake. Here the accounts presented are found to be wholly illegal, and beyond the power of the commissioners to adjudicate. A number of cases have been cited where acts of commissioners, unauthorized when performed, are sustained on the ground of estoppel. No comment is necessary upon these adjudications, as no estoppel is urged in either of the cases at bar.

But it is insisted that each presentation was simply a personal application for pay for personal services, and the money was drawn by virtue of the allowance of the commissioners after due submission and approval by the board, and that the drawing of the money in each case then became a personal, and not an official, act, and hence was not a violation of the official bond. We have already found that the several claims were all illegal;

that is, there was no warrant of law for any claim whatever in either instance. This fact it must be presumed the auditor knew. Whether in fact he knew or not, it was his duty to know. The subject related to his own duties and his own <sup>218</sup> compensation. He could not be heard, in an inquiry of this character, to deny knowledge as to what the law provided in those respects, and it is quite the same, as matter of legal conclusion, for the purposes of the present case, as though the facts disclosed actual knowledge on his part of the unfounded character of his demands. The proposition that the drawing of money from the county treasury, by a county auditor, upon his own warrant, on a claim in his own favor, known by him to be illegal, for alleged services rendered the county, is a matter merely of individual action, and not a disregard of official duty, is at least a startling one. It appears to be based upon an attempt to distinguish between the man as an individual, and the man as an officer. The distinction cannot hold. The petition declares that Lewis received the money as auditor. But is there not sufficient showing, aside from this, that the acts were official acts? The money being drawn upon the auditor's official warrant, why is not that an official act? We think it is. It is so held in *Cricket v. State*, 18 Ohio St. 9. As said by White, J., in the opinion: "The warrant purports to be an official act; it was drawn under the color of office, and constituted the means by which the money was obtained from the treasury": See, also, to the same purport in a case involving the bond of a county treasurer, *State v. Kelly*, 32 Ohio St. 421. If the claim in his favor be unfounded, the drawing of the money upon it would seem to be a violation of official duty at common law; but it is in terms made unlawful by section 1078, in this distinct language: "and it shall be unlawful for any county auditor to charge or receive any other or further fees or compensation, either as clerk of <sup>219</sup> any board, or for any other services rendered by him." In the face of this provision, how can it be said that the acts complained of are not malfeasances? If they are, they clearly come within the condition of the bond: *Cricket v. State*, 18 Ohio St. 9. That the legislature of this state, having required, as a condition of holding office by certain officers, that they give bond for the faithful performance of duty, would then intentionally direct a course of procedure which will permit such officers, in their official capacity and by their official warrants, to illegally draw money from the public funds, for their own use, is equivalent to saying that a principal, before employing an

agent, would require him to give security, but would intentionally so frame the bond as to afford protection to all the world save the principal himself, and is past belief; nor do we think that body has done so inadvertently. Suppose, say counsel, in support of the proposition that the act of drawing the warrant and the money is not a violation of the bond, that an ex-auditor should present an unauthorized claim to the commissioners, which being allowed, a warrant is drawn by his successor on the treasury for the amount. Would the auditor, by drawing such warrant, violate the condition of his bond? Well, we are not called on to decide this question, for we have not that case. That would be a situation where the auditor presumably relied upon the order of the commissioners without knowledge of its illegality and in a matter in which he had no personal concern or interest. Our case is one where the auditor has acted from the inception of the transaction on his own volition in a matter which on its face concerns his own official pay, and the warrant therefor, drawn in his official capacity, <sup>220</sup> by force of the statute which defines the powers and duties of his office, is unauthorized at best, and in defiance of a statute which says it shall be unlawful for him to charge or receive any compensation for such alleged service.

If this conclusion be correct, then an action is clearly maintainable against both the auditor and the bondsmen by the prosecuting attorney. Section 1131, of the Revised Statutes, provides for the appointment by the court of common pleas of a committee to examine the books and papers in the office of the auditor, and for the making to the court of a report of their proceedings, and the results of their examination, while section 1133 makes it the duty of the prosecuting attorney, in case the report shows a breach of the bond, to forthwith commence an action on the bond of the delinquent officer. The report of such committee is the basis of the action here, and we regard it as well founded.

Judgment affirmed.

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**OFFICERS' FEES—ILLEGAL EXACTION.**—Public officers were not permitted at common law to take any fees except such as were expressly allowed them by statute: *Gibson's case*, 1 Bland, 138; 17 Am. Dec. 257. It is well settled that where money is exacted by, and paid to, a public officer in excess of his legal fees, in order to obtain the performance of an official duty, to which the party is entitled without such payment, an action lies to recover back the money, as having been involuntarily paid: See monographic note to *Mayor v. Lefferman*, 45 Am. Dec. 167, 168.

**OFFICERS—COUNTY COMMISSIONERS—ALLOWANCE OF CLAIMS.**—Boards of county commissioners in some respects act ju-



dicially, and in others ministerially. While rightfully acting in the former character they are treated as courts, and their judgments and orders cannot be collaterally assailed, and the principles of former adjudication are applicable to them; but when they act ministerially their orders are not judicial, and are not binding on the county, when not authorized by law. In hearing and allowing claims against the county they do not act in their judicial capacity; and the county may maintain an action to recover back money paid to a public officer, though his claim was allowed by the county commissioners, whenever, in equity and good conscience, he ought not to retain such moneys: *Commissioners v. Heaston*, 144 Ind. 583; 55 Am. St. Rep. 192, and monographic note discussing the conflict of authority upon this question: *Board v. Nichols*, 12 Ind. App. 315; 54 Am. St. Rep. 528. Contra, *McConoughey v. Jackson*, 101 Cal. 265; 40 Am. St. Rep. 53. For a more recent case, see *Bush v. Johnson Co.*, 48 Neb. 1; 58 Am. St. Rep. 673.

## KELLEY v. OHIO OIL COMPANY.

[57 OHIO STATE, 317.]

**OIL WELLS—RIGHT TO DRILL.**—An owner or lessee of oil lands has an absolute right to drill an oil well near the division line of his land, so long as all operations are confined to the lands upon which the well is drilled; and whatever gets into such well, either by percolation or by flowing through unknown natural underground channels, belongs to the owner of the well, no matter where it comes from.

**OIL WELLS—RIGHT TO DRILL.**—The right to drill oil wells and to produce oil on one's own land is absolute, and cannot be enjoined, supervised, or controlled by a court, or an adjoining owner, and so long as such operations are legal their reasonableness cannot be drawn in question.

**PETROLEUM OIL IS A MINERAL**, and while in the earth is part of the realty, and if it moves from place to place, by percolation or otherwise, it forms part of the tract of land in which it tarries for the time being, and if it then moves to another tract it becomes part of that tract.

**PETROLEUM OIL—WHEN PERSONALTY.**—Petroleum oil forms part of some tract of land, until it reaches a well and is raised to the surface; it then becomes the personal property of the person into whose well it comes and who raises it to the surface.

**PETROLEUM OIL, PROPERTY IN.**—Petroleum oil, whether it moves, percolates, or exists in pools or deposits, is the property of the person who reaches it by means of a well, and severs it from the realty and converts it into personalty.

**PETROLEUM OIL—RIGHT TO.**—An owner may so use his own premises as to secure and appropriate petroleum oil which comes into his land by percolation, or by flowing through unknown natural underground channels.

G. H. Phelps, for the plaintiff in error.

J. Poe and J. A. Troup, for the defendant in error.

**327** BURKET, C. J. The question is not as to the motive, fraud or malice which may have induced the oil company to drill

the wells sought to be enjoined. The only question of practical importance is, had the oil company the legal right to drill the wells?

When a person has the legal right to do a certain act, the motive with which it is done is immaterial. The right to acquire, enjoy, and own property, carries with it the right to use it as the owner pleases, so long as such use does not interfere with the legal rights of others.

To drill an oil well near the line of one's land cannot interfere with the legal rights of the owner of the adjoining lands, so long as all operations are confined to the lands upon which the well is drilled. Whatever gets into the well, belongs to the owner of the well, no matter where it came from. In such cases the well and its contents <sup>328</sup> belong to the owner or lessee of the land, and no one can tell to a certainty from whence the oil, gas or water which enters the well came, and no legal right as to the same can be established or enforced by an adjoining landowner.

The right to drill and produce oil on one's own land is absolute and cannot be supervised or controlled by a court, or an adjoining landowner. So long as the operations are legal, their reasonableness cannot be drawn in question.

As was pointed out in *Letts v. Kessler*, 54 Ohio St. 73, it is intolerable that the owner of real property, before making improvements on his own lands, should be compelled to submit to what his neighbor, or court of equity might regard as a reasonable use of his property.

Petroleum oil is a mineral, and while in the earth it is part of the realty, and should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and if it moves to the next adjoining tract, it becomes part and parcel of that tract; and it forms part of some tract, until it reaches a well and is raised to the surface, and then for the first time it becomes the subject of distinct ownership separate from the realty, and becomes personal property, the property of the person into whose well it came. And this is so whether the oil moves, percolates, or exists in pools or deposits. In either event, it is property of, and belongs to, the person who reaches it by means of a well, and severs it from the realty and converts it into personalty.

While it is generally supposed that oil is drained into wells for a distance of several hundred feet, this is matter somewhat uncertain, and no right of <sup>329</sup> sufficient weight can be founded

upon such uncertain supposition, to overcome the well-known right which every man has to use his property as he pleases, so long as he does not interfere with the legal rights of others.

Protection of lines of adjoining lands by the drilling of wells on both sides of such lines, affords an ample and sufficient remedy for the supposed grievances complained of in the petition and supplemental petition, without resort to either an injunction or an accounting.

The case of Columbus etc. Coal Co. v. Tucker, 48 Ohio St. 41, 29 Am. St. Rep. 528, and Collins v. Chartiers Valley Gas Co., 131 Pa. St. 143, 17 Am. St. Rep. 791, and other like cases in which some harmful substance was sent, conveyed or caused to go from premises of one to the premises of another, have no application here, because in this case, nothing reached the plaintiff's lands from the premises of the defendant, and the only complaint is, that the oil company so used its own premises as to secure and appropriate to its own use that which came into its lands by percolation, or by flowing through unknown natural underground channels. This it had a right to do. While the drilled oil well is artificial, the pores and channels through which the oil reached the bottom of the well are natural.

Judgment affirmed.

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**MINES AND MINING—OIL AND GAS—PROPERTY IN.**—Petroleum oil and natural gas are minerals: Marshall v. Mellon, 179 Pa. St. 371; 57 Am. St. Rep. 601; People's Gas. Co. v. Tyner, 131 Ind. 277; 31 Am. St. Rep. 433. Lands from which petroleum is obtained may be properly called "mining lands": Note to Marshall v. Mellon, 57 Am. St. Rep. 603. He who owns the surface of land may dig therein, and apply to his own purpose whatever he may there find between the surface and center of the earth. Petroleum oil is a part of the soil in which it is found, and is not the subject of property except while in actual occupancy: People's Gas Co. v. Tyner, 131 Ind. 277; 31 Am. St. Rep. 433. "If an adjoining, or even a distant, owner drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his": Westmoreland etc. Gas Co. v. De Witt, 130 Pa. St. 235.

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## STATE v. JENNINGS.

[57 OHIO STATE, 415.]

**OFFICERS.—OFFICE CREATED BY ORDINANCE** may be abolished by repeal of the ordinance, and the incumbent thereupon ceases to be an officer.

**OFFICERS—QUO WARRANTO.**—It is only the incumbent of a public office whose rights can be challenged in a proceeding in quo warranto.



**OFFICERS—PUBLIC OFFICE, WHAT IS.—**A public office, such only as may properly come within the legitimate scope of a proceeding in quo warranto, is a public position to which a portion of the sovereignty of the state, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public.

**OFFICERS—PUBLIC OFFICER, FIREMAN IS NOT.—**An ordinary fireman, employed as such by a city, with no control over the fire department, nor any of its property, except to use it in the extinguishment of fires, and who is subject at all times to the direction and control of the chief of the fire department, and paid a monthly salary, subject to discharge at any time by the city council, is an employé and not a public officer, and cannot be ousted from his employment by a proceeding in quo warranto.

F. S. Monnett, Attorney General, J. A. Flory, S. L. James, and B. G. Smythe, for the plaintiff.

T. B. Fulton, City Solicitor, J. B. Jones, and S. M. Hunter, for the defendants.

<sup>422</sup> **MINSHALL, J.** It is averred by the attorney general in the petition that James Jennings and others specifically named, have been and are now unlawfully usurping and holding the offices of "firemen" in the fire department of the city of Newark, this state, and asks that they be ousted therefrom and that Frank Alexander and others, specifically named, and entitled thereto, be inducted into the offices so usurped.

The case has been submitted to the court on an agreed statement of facts, from which it appears that in 1895, the city council of Newark passed an ordinance organizing its fire department; and by which it was provided that it should consist of ten firemen, one of whom should be elected as chief by the appointment of the mayor with the advice and <sup>423</sup> consent of the council, and provided for their compensation. The persons, whose induction is asked for, were appointed under the provisions of this ordinance. The chief is not included in the number and all were simply appointed as "firemen." On June 23, 1897, the council adopted an ordinance, repealing the former one, and providing for the employment of the "firemen" by the council, the chief, however, being appointed as formerly. The section as to the firemen is as follows: "The said council shall employ as many assistant firemen, from time to time, as to them may seem necessary, who shall receive for their services not to exceed fifty dollars per month." Afterwards the firemen appointed under the former ordinance were discharged by resolution of the council, and by another resolution the defendants were employed.

The contention of the relator is that a fireman is an officer, and therefore, under section 1711, of the Revised Statutes,

which requires all officers of the municipality, not elected by the people, to be appointed by the mayor with the advice and consent of the council, the defendants, not being so appointed, have no right to the office, should be ousted, and the former incumbents inducted, as officers holding over until their successors are duly appointed and qualified. We do not adopt this view. There is no question but that the council had the power to repeal the former ordinance; and this being so, and all the offices created by it, whatever they were, being thus abolished, the incumbents ceased to be officers, for there can be no incumbent without an office: *State v. Auditor*, 7 Ohio St. 333; *Gano v. State*, 10 Ohio St. 238; *State v. Hawkins*, 44 Ohio St. 98. So that the real question in the case <sup>424</sup> is, whether a "fireman" is an officer, or, in this case, whether the firemen, for whose employment provision is made in the ordinance of 1897, are officers. For that a position in the fire department of a city may have such duties attached to it, as to constitute an office is not questioned. The chief of a fire department performs such duties as make him an officer. But the character of an office cannot be attached to a position by a name merely. Whether it be an office or not, will depend upon the nature and character of the duties attached to it by law.

Many efforts have been made to define a public office; and it is only the incumbent of such an office whose rights can be challenged in a proceeding in quo warranto. But it is easier to conceive the general requirements of such an office, than to express them with precision in a definition that shall be entirely faultless. It will be found, however, by consulting the cases and the authorities, that the most general distinction of a public office is, that it embraces the performance by the incumbent of a public function delegated to him as a part of the sovereignty of the state. Thus in *Mechem's Offices and Officers*, section 4, it is said: "The most important characteristic which distinguishes an office from an employment or contract, is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, or judicial, attaches, for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer." So, in *High on Extraordinary Legal Remedies*, section 625, it is said: <sup>425</sup> "An office, such as to properly come within the legitimate scope of an

information in the nature of a quo warranto, may be defined as a public position, to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public." And in the case of *Darley v. Queen*, 12 Clark & F. 520, which is generally cited as a leading case, and where the question was whether the information would lie against the treasurer of the city of Dublin, Tindal, C. J., said: "After the consideration of all the cases and dicta on the subject, the result appears to be that this proceeding by information in the nature of a quo warranto will lie for usurping any office, whether created by charter alone, or by the crown with the consent of parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others, for, with respect to such an employment, the court certainly will not interfere, and the information will not properly lie." The fact that a public employment is held at the will or pleasure of another, as a deputy or servant, who holds at the will of his principal, is held, by the judges of the supreme court in an opinion delivered to the legislature of the state of Maine, to distinguish a mere employment from a public office, for in such cases no part of the state's sovereignty is delegated to such employes: Opinion of Judges, 3 Greenl. 481. The case of *State v. Brennan*, 49 Ohio St. 33, is not at variance with these views. It is quite clear from what has been said that the "stationery storekeeper" under consideration in that case was a public officer. He was charged with the purchase <sup>426</sup> and safekeeping of the stationery required by the county. The judge in delivering the opinion, did not undertake to give an exhaustive definition of a public office; but did say that "it is safely within bounds to say that where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, or with functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office." Here, and throughout the opinion, prominence is given to the fact, that a public officer is one who exercises, in an independent capacity, a public function in the interest of the people, by virtue of law, which is only saying in another form, that he exercises a portion of the sovereignty of the people delegated to him by law.



Applying what has been said to the case before us, and it clearly appears, as we think, that the firemen, other than the chief, employed by the council under the ordinance of June 23, 1897, are not public officers. They have no control of the fire department, nor of any of its property for any purpose, other than to use it in the extinguishment of fires whenever the occasion requires. They are subject on all occasions and in whatever they do in the course of their employment, to the direction and control of the chief of the department. They receive for their services fifty dollars per month, and may be discharged at any time by the council. Hence they are simply persons in the employment of the fire department, and are not public officers of any kind.

<sup>427</sup> We are, however, cited to some cases where it has been said, as a reason for the nonliability of a city for the acts of its fire department, that firemen are officers. On examination it will be found that this is not the true reason. It assumes that a city is in no case liable for the acts of its officers. But this is not true in all cases. A city is liable for the wrongful or negligent acts of its street commissioner. It is true that, in this instance, it is made the duty of a city to keep its streets in repair and free from nuisances, whilst, in this state, it is not required to establish a fire department. But if it organizes a fire department, and levies a tax for its support, it would then seem to become its duty to see that it is properly organized, and that its agents carefully perform their duties in the one case as well as in the other. For it is a general principle, that, though a person may not be bound to do a particular thing, yet if he voluntarily undertake to do it, he is bound to use reasonable care and diligence in its performance, and is liable in damages to one injured from his failure to do so. There is no statutory duty in cities to construct sewers; but if a city does, it becomes liable to a party injured by the negligence of its officers and agents, in constructing and maintaining them: *Dillon on Municipal Corporations*, sec. 980. The levying of the tax and assuming to act in the premises imposes the duty. Hence the true reason for the exemption of a city from liability for the acts of its firemen, is most probably not referable to the fact that they are officers but to the fact that it would be unwise to burthen the taxpayers of a city with damages resulting from the negligence of its agents in such cases; in other words, is simply a limitation suggested <sup>428</sup> by the policy of the law on the maxim *respondet superior*, in its application to cities in such cases. In none of

these cases was any effort made to determine what, in general, constitutes a public officer. In 4 Dillon on Municipal Corporations, section 976, it is said: "The exemption from liability in these and the like cases, is upon the ground that the service is performed by the corporation in obedience to an act of the legislature; is one in which the corporation, as such, has no particular interest, and from which it derives no special benefit in its corporate capacity; as the members of the fire department, although appointed and employed, and paid by the city corporation, are not the agents and servants of the city, for whose conduct it is liable." So that the simple fact that a city is not liable for the acts of its fire department does not prove that all of its members are necessarily public officers; and may, when not properly employed, be ousted from their employment by the state, as usurping on its authority in a proceeding in quo warranto. We are therefore led to the conclusion that none of the firemen proceeded against in this case can properly be termed public officers; they are clothed with none of the requisites of such an officer; are simply in the employment of the city as laborers, and the right to be so employed cannot be challenged by quo warranto. The fact that their employment requires skill and experience does not alter the case. Skill and experience do not constitute a public office; they are simply requirements of suitableness for the place; and are no more attributes of a public office than of a private employment.

Writ refused and petition dismissed.

**THE SUBSEQUENT CASE** of *State v. Anderson*, 57 Ohio St. 429, involved the same facts as the principal case, and was decided on the authority thereof. It was held that a person employed by a city to trim lights in its electrical department, as well as an engineer in such department, was a simple employé, and not a public officer.

**OFFICERS—PUBLIC OFFICER—WHAT IS.**—A public officer is one whose duties are in their nature public, involving in their performance the exercise of some portion of the sovereign power, whether great or small, and in whose proper performance all citizens, irrespective of party, are interested equally as members of the entire body politic, or of some duly established division thereof: *Attorney General v. Drohan*, 169 Mass. 534; 61 Am. St. Rep. 301, and note; monographic note to *State v. Hocker*, ante, p. 181.

**OFFICES—ABOLISHMENT OF.**—An office is simply an appointment or authority on behalf of the government to perform certain duties, usually at and for a certain compensation. Both the office itself and the compensation, upon general principles of law, are entirely within the control of the government to diminish, increase, or abolish: Note to *Memphis v. Woodward*, 27 Am. Rep. 754; *State v. Douglass*, 26 Wis. 428; 7 Am. Rep. 87; note to *Hoke v. Henderson*, 25 Am. Dec. 703. Compare *Warner v. People*, 2 Deno, 272; 43 Am. Dec. 740, and note.

**QUO WARRANTO.**—An information in the name of the attorney general cannot be maintained to try the title to any other than a public office: *Attorney General v. Drohan*, 169 Mass. 534; 61 Am. St. Rep. 301, and note.

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## **MACK v. THE DE GRAFF AND ROBERTS QUARRIES.**

[57 OHIO STATE, 463.]

**MECHANICS' LIENS—CONFLICT OF LAWS—INTER-STATE CONTRACT.**—A subcontractor, who, in another state, contracts, sells, and delivers to a principal contractor materials to be transported by the latter to Ohio, and there used by him in constructing a building or public improvement, is entitled to a mechanics' lien in the latter state under its statute providing that any materialman who furnishes material for the construction of an improvement, by virtue of a contract with the owner, or between any board or officer, and a principal contractor, shall have a lien therefor.

**MECHANICS' LIENS—REMEDIAL LAWS—EXTRATERRITORIAL OPERATION.**—Remedial laws, such as mechanics' lien laws, do not operate extraterritorially, on account of being applied by the courts of the state in which they are in force, to actions pending in such courts on contracts made and to be performed in another state or country. Remedies must be applied according to the place where the action is instituted, without regard to the place where the right arises.

G. A. Laubscher and J. G. White, for the plaintiff in error.

Wilcox, Collister, Hogan & Parmely, and Ford, Boyd & Crowl, and M. G. Morgan, for the defendants in error.

**475** **BRADBURY, J.** In the year 1893, J. L. Sterling & Son entered into a contract with the city of Cleveland, for paving Kinsman street in said city. From time to time, as the work progressed, estimates were made of the amount of work done, and of the sums payable to the contractors on account thereof. About the fifth day of July, 1893, an estimate was made, designated as the third, amounting to two thousand four hundred and thirty-seven dollars and forty-three cents. Before this estimate was made, the contractors assigned and transferred to "The John **476** Porter Company" three thousand dollars of it. This sum was larger than proved to have been earned when, afterward, the assessment was made, so that the assignment covered this entire assessment and was not then fully satisfied.

Notice of this assignment was duly given to the city; afterwards "The John Porter Company" assigned to the plaintiff in error whatever claim it had against the city of Cleveland by virtue of the assignment before noted, made to it by the contractors, J. L. Sterling & Son.



The contractors, J. L. Sterling & Son, procured the stone with which they paved Kinsman street, from the "The De Graff & Roberts Quarries," defendants in error, and on the third day of July, 1893, the latter company, proceeding under section 3193, Revised Statutes, filed with the proper boards of the city of Cleveland, a sworn and itemized statement of the amount and value of the stone furnished by them to the contractors for paving Kinsman street, and at the same time filed a copy of such statement with the recorder of Cuyahoga county.

The city of Cleveland declining to pay the assignee the sum assigned, he brought, in the court of common pleas of Cuyahoga county, an action against the city for its recovery. Thereupon the city answered admitting the making and the amount of the estimate in controversy, but denying that it owed the full amount thereof, and asking that the "The De Graff & Roberts Quarries" be made a party to the action, which accordingly was done. The "The De Graff & Roberts Quarries," on being brought into the action, answered, setting forth that it was a corporation organized under the laws of the state of New York, and duly <sup>477</sup> authorized to transact business in the state of Ohio, and also setting forth that it had furnished to the contractors, under a contract entered into with them, the stone used for paving Kinsman street, and that not having been paid for the same, they had perfected a subcontractor's lien on any fund due from the city on account of the paving of Kinsman street.

The cause was tried to the court, and at the request of the defendants, the court found and stated the facts, separate from its conclusions of law. It found that the city was indebted to the amount of the estimate No. 3, and that with interest thereon, aggregated two thousand six hundred and ninety-two dollars and seventeen cents.

There seems to have been no contention respecting the regularity of the assignment and transfer of this estimate by the contractor, J. L. Sterling & Son, to the John Porter Company nor from the latter to the plaintiff in error, so that his right to a judgment against the city was clearly established, unless the De Graff & Roberts Quarries had acquired a right thereto as subcontractors by virtue of section 3193 of the Revised Statutes. This brings us to the real question in the case.

The finding of facts shows that the De Graff & Roberts Quarries had taken every formal step required to perfect their lien upon the fund, but it shows also that the De Graff & Roberts Quarries was a corporation created under the laws of the state of New York; that the contract to furnish the stone for paving

Kinsman street was made in the state of New York; that the stone was to be delivered to the contractors in that state and by them transported to Cleveland, Ohio; that it was so delivered and transported, and that the stone was sold and delivered for the purpose of being <sup>478</sup> used by the contractors for paving Kinsman street, and except a small quantity was thus used. The court further found that by the laws of the state of New York, no lien exists for materials furnished in other states to be used in New York. The court of common pleas holding this to be a New York contract, and also holding that the mechanics' lien laws of Ohio have no extraterritorial operation, refused to enforce the lien taken by the De Graff & Roberts Quarries Company, and gave judgment for the plaintiff in error. On proceeding in error had in the circuit court this judgment was reversed, and the judgment rendered on the finding of facts in favor of the De Graff & Roberts Quarries.

Section 3184 of the Revised Statutes, provides that: "A person who performs labor, or furnishes . . . . material for constructing, etc. . . . . a house . . . . by virtue of a contract with the owner . . . . shall have a lien."

Section 3193 of the Revised Statutes, which provides the remedy for subcontractors, etc., employs language equally comprehensive. It reads as follows: Sec. 3193. "Any subcontractor, materialman, laborer, or mechanic who has . . . . furnished material . . . . for the construction . . . . of any turnpike road improvement, or other public improvement, provided for in a contract between . . . . any board or officer, and a principal contractor . . . . may . . . . file . . . . a sworn and itemized statement."

The argument for the exclusion of defendants in error from the beneficial operation of these statutes is not based on any words of exclusion contained in the statutes themselves, but is vested on those general principles, that pertain to the conflict of laws.

<sup>479</sup> Counsel for plaintiff in error contends that the lien is merely incidental to and arises out of the contract under which the material is to be delivered; that as the contract under which defendant in error furnished the material in question was made and fully executed in the state of New York, it was a New York and not an Ohio contract; that it must have been made with reference to the laws of New York and not to those of Ohio, and that therefore an incident, depending wholly on the statutes of Ohio, would not attach to the contract, and in fact could not

attach to it without giving to the statutes of Ohio an extraterritorial effect.

In confirmation of this view of the subject counsel cite a decision of this court: *Beckel v. Petticrew*, 6 Ohio St. 247. It was there held that: "The lien authorized by the act to create a lien in favor of mechanics and others in certain cases will extend to all materials, in good faith furnished for the purpose of erecting, or repairing a house in pursuance of a contract with the owner notwithstanding a portion of such material may subsequently be otherwise appropriated without the consent of the party furnishing them."

This decision, it is claimed, vests the lien of the materialman upon the contract and not upon the use to which the materials furnished by him were devoted.

It is quite correct to say that this decision holds that if the contract, under which materials have been furnished for constructing, etc., any building, etc., within the statute, discloses that such materials were furnished for the purpose of being used in the performance of the work of construction, etc., that this purpose is enough to create the lien, even if the materials should be diverted from such <sup>480</sup> use, provided the materialman did not consent to such diversion. Our attention also, might have been called to a still earlier case decided by this court: That of *Choteau v. Thompson*, 2 Ohio St. 114, when it was held: "If work be done or materials furnished, without a contract that they shall be put to the particular use of erecting, altering, or repairing a craft or building, no lien can be asserted upon the building or vessel in which they may be placed. The contract intended by the statute is one that has reference to the purpose for which the work is done or the materials furnished."

These two decisions establish both the necessity of a contract prescribing the purpose to which the materials are to be devoted, and its sufficiency to create the lien, although the material should be diverted from the use agreed upon; the lienor not assenting thereto. Notwithstanding the stress placed upon the contract by these decisions, we do not think it follows from them as a necessary sequence that the lien of the mechanic and materialmen is a mere incident of such contracts, attaching only where the contracts are Ohio contracts, that is, where they are to be executed within this state.

The lien is a creature of our statutes, and whoever falls within the descriptive words of the statute may rightfully claim its benefit, wherever our statutes may be enforced. This court, in the



cases of *Choteau v. Thompson*, 2 Ohio St. 114, and *Beckel v. Petticrew*, 6 Ohio St. 247, was not dealing with the question now under consideration; it was not then concerned about the nativity of the contract; it was construing the statute respecting the matters then in hand, in order <sup>481</sup> to arrive at the legislative intention respecting them. In the first case it held, among other things, that a sale of materials, without any reference to the use to which they should be put, would not afford a ground to assert a lien, because the contract referred to by the statute required that the materials should be sold for the purpose of being used for the construction, etc., of the house, etc., upon which the lien was to be asserted. In the second case it held that the statute, when fairly construed, did not require that all the materials furnished under the contract should have been used in the structure for which they were furnished and on which the lien was asserted. In those cases our predecessors were seeking to ascertain, and to declare the intention of the legislature, and for that purpose they looked to the language which that body had employed. We are required not only to ascertain the legislative intention, but also to determine whether the subject over which they attempted to legislate was within their authority.

To ascertain the legislative intention we must look to the language it employed to express it. When this is done, we find the language employed, when construed according to its natural import, will clearly embrace all contracts to furnish materials for the purposes named in the statute, regardless of the place where the contract was made or the materials to be delivered. The words are "any . . . . materialman," etc, "who has furnished material . . . . for the construction . . . . of an improvement," . . . . more comprehensive language could not have been used. No other words appear that tend to establish <sup>482</sup> an intention to narrow the scope of those recited, or that indicate a purpose to limit the benefits of the statute to vendors, who bring within the state the materials they furnish. The defendants in error, therefore, are plainly within the terms of the statute. This construction finds support in *Sproul v. McCoy*, 26 Ohio St. 577, where this court held that the statutes of this state allowing exemptions from execution and sale to "every person who has a family," may be invoked by "any debtor against whom an action is prosecuted in the courts of this state, whether such debtor be or be not a resident of this state." The language of the statute granting the exemption is no more comprehensive than that employed by the mechanics' lien statutes in giving a lien to subcontractors and materialmen.

We now come to the question of the power of the legislature to dispose of the fund, or create a lien, in favor of a vendor who sells and delivers materials in another state.

That the statutes of Ohio cannot operate, *propria vigore*, beyond the boundaries of the state, is a settled rule of law, and therefore, notwithstanding the intention of the legislature to embrace within the beneficial provisions of the statute all persons who should sell and deliver, in another state, materials to be brought here and used for the purposes designated by the statute, yet the statute could not be applied to such transactions, if thereby its operation was extraterritorial. Remedial laws, however, whether written or unwritten, do not operate extraterritorially, on account of being applied by the courts of the state in which they are in force, to actions pending in such courts on contracts made and to be performed <sup>483</sup> in another state or country. Remedies will be administered according to the law of the place where the action is instituted, without regard to the law of the place where the right arose: *Heaton v. Eldridge*, 56 Ohio St. 87; 60 Am. St. Rep. 737; *Andrews v. Herriott*, 4 Cow. 508; *Robinson v. Bland*, 2 Burr. 1084; *De La Vega v. Vienna*, 1 Barn. & Adol. 284; *Trasher v. Everhart*, 3 Gill & J. 234; *Hyde v. Goodnow*, 3 N. Y. 270; *Bank v. Donnally*, 8 Pet. 361. This principle is illustrated and enforced by a large array of authorities, that are practically unanimous, but it is not necessary to refer to them further.

By the great weight of authority statutes that relate to liens of mechanics and materialmen are remedial; instead of creating new and substantive rights, they simply afford new and cumulative remedies to enforce obligations previously recognized: *Hanes v. Wadey*, 73 Mich. 178; *Best v. Baumgardner*, 122 Pa. St. 17; *Martin v. Hewitt*, 44 Ala. 419; *Hall v. Bunte*, 20 Ind. 304; *Bangor v. Goding*, 35 Me. 73; 56 Am. Dec. 688; *Frost v. Ilsley*, 54 Me. 345; *Woodbury v. Grimes*, 1 Colo. 100.

These principles would seem to settle the question in favor of the operation of the statute in the case of material delivered in another state.

However, should the rule in reference to the nature of mechanics' lien laws be otherwise, and those laws held to create substantive rights, which, when once vested, are placed beyond legislative interference, nevertheless as the fund in controversy originated under our laws, was actually within our borders, and was in the custody and subject to the orders of one of our courts, it would <sup>484</sup> seem to naturally follow that its disposition should

follow the course prescribed by our legislature. To thus dispose of the fund is to assert the dominion of our own statutes, while to distribute it according to the statutes or decisions of another state would be to acknowledge their superiority. The case does not fall within the reasons of those rules which induce the court of one state or country to construe the rights of parties arising under a contract, made and to be executed in another state, according to the laws of the latter. In the case before us the material was furnished for the purpose of being used in an improvement to be made in this state; under such circumstances how can it be said that the parties did not contemplate the laws of Ohio in reference to rights which thus arise? Surely if the question related to a lien upon real estate, such as the mechanics' lien laws of this state create, its existence and its terms would depend upon our statutes; the laws of New York could place no burden upon land situated in Ohio. True, a lien upon real estate was not asserted nor involved in the case before us, but there was involved the distribution of a fund created and set aside by a statute of this state for the benefit of persons who might fall within the class declared by that statute to have a right to share in its distribution. The statute in conferring this benefit made no distinction between a fund raised by a sale of real estate upon which a lien was given, and a fund in the possession of some public agency. In each case the distribution was to be made according to the same rule. We think the right of the parties in either case was determinable according to the laws of this state.

<sup>485</sup> This view of the question is strongly supported by the decisions of this court in respect of the water craft statutes: *Schooner Aurora Borealis v. Dobbie*, 17 Ohio, 125; *Steamboat Ohio v. Stunt*, 10 Ohio St. 582; *Steamboat Messenger v. Pressler*, 13 Ohio St. 255. It also finds support in the following cases: *St. Louis Bridge etc. Co. v. Memphis etc. R. R. Co.*, 72 Mo. 664; *Thompson v. St. Paul etc. Ry. Co.*, 45 Minn. 13, 15; *Great Western Mfg. Co. v. Hunter*, 15 Neb. 33, 37; *Fagan v. Boyle Ice Machine Co.*, 65 Tex. 324; *Gaty v. Casey*, 15 Ill. 189.

The defendant in error, The De Graff & Roberts Quarries, was, by the court of common pleas, made a party to the action on the application of the city of Cleveland. This action of that court is attacked as erroneous by counsel for plaintiff in error, but as the question does not arise on the records, it has not been considered in this opinion.

**Judgment affirmed.**



**MECHANICS' LIENS—CONFLICT OF LAWS—EXTRATERRITORIAL EFFECT.**—The laws of a state can have no force proprio vigore outside of that state: *Falls v. United States Sav. etc. Co.*, 97 Ala. 417; 38 Am. St. Rep. 194; *Sneed v. Ewing*, 5 J. J. Marsh. 460; 22 Am. Dec. 41. The lex fori prevails in questions concerning the remedy: *Note to Hamilton v. Cooper*, 12 Am. Dec. 591. The New York mechanic's lien statute, similar to that construed in the principal case, was held to have no extraterritorial force, being merely intended for those who performed labor or furnished materials within the state of New York: *Birmingham Iron Foundry v. Glen Cove etc. Mfg. Co.*, 78 N. Y. 30. See Phillips on Mechanics' Liens, 3d ed., secs. 34, 112, 491. The place of the contract is not important as the lien arises not from the contract, but from the use of the materials furnished upon the premises, the putting them into the building, and attaching them to the freehold: *Gaty v. Casey*, 15 Ill. 190. See *Fagan v. Boyle Ice Machine Co.*, 65 Tex. 324.

## LUFKIN RULE COMPANY v. FRINGELI.

[57 OHIO STATE, 596.]

**CONTRACTS—RESTRAINT OF TRADE.**—All agreements in general restraint of trade are against public policy and void, but agreements that only impose a partial restraint made in connection with the purchase of a business that are reasonably necessary to make available the goodwill purchased with the business, and are reasonable and not oppressive, may be enforced.

**CONTRACTS—RESTRAINT OF TRADE.**—An agreement entered into at the time that a business with the goodwill thereof is sold, not to engage in the same business, directly or indirectly, in that state, or in the United States, for a period of twenty-five years, is in restraint of trade and void as tending to create a monopoly, whether or not such restraint is necessary to the reasonable enjoyment of the goodwill so purchased.

**CONTRACTS—RESTRAINT OF TRADE.**—An agreement entered into at the time that a business with the goodwill thereof is sold, not to engage directly or indirectly in the same business again in the same state for the period of twenty-five years, is in general restraint of trade, tends to create a monopoly, and is void.

**CONTRACTS—RESTRAINT OF TRADE.**—Contracts whereby men are purchased out of business, and restrained from carrying it on anywhere else, tend to create a monopoly, and are void.

Dickey, Brewer & McGowan, for the plaintiff in error.

A. T. Brinsmade, for the defendants in error.

601 **MINSHALL, J.** The question in this case arises on a demurrer to the petition, which was sustained in the common pleas, and the judgment was affirmed in the circuit court. From the petition and the agreement annexed to it, it appears that Xavier and Lucas Fringeli, as partners under the name of the Fringeli Rule Company, were carrying on the business at Cleveland, Ohio, of manufacturing and selling rules and other instruments used principally in measuring lumber; and that the plain-

tiff, the Lufkin Rule Company, an Ohio corporation with its principal office at Saginaw, Michigan, engaged in the same business, on January 28, 1893, purchased the business and assets of the Fringelis, together with the goodwill of the firm, they agreeing not to engage in the same business, directly or <sup>602</sup> indirectly, in the state of Ohio or in the United States for a period of twenty-five years. The Fringelis also assented to the statement, contained in the agreement between the parties, "that the demand for the different kind of rules which they produce is limited as to quantity and restricted to the section of the United States where lumber is manufactured and handled; and the parties of the second part (Lufkin Rule Company) have ample facilities to supply the demand in all sections of the United States, promptly, at reasonable figures." Afterwards, the agreement having been performed on the part of the plaintiff, the defendants violated it and continue to violate it, by carrying on the same business with others at Cleveland, Ohio, in the name of the Cleveland Rule Company. It asked for liquidated damages as fixed by the agreement, and for an injunction restraining the defendants from further prosecuting the business.

It is the settled rule in this state that all agreements in general restraint of trade are against public policy and void; but it is held that agreements that only impose a partial restraint, made in connection with the purchase of a business, that are reasonably necessary to make available the goodwill purchased with the business, and are reasonable and not oppressive, may be enforced. The case of *Lange v. Werk*, 2 Ohio St. 519, is the leading one on the subject. The authorities there, both in England and in this country at that time, were so fully and intelligently considered, as to dispense with their examination here.

In that case the party, by his covenant, was restrained from engaging in the business of manufacturing stearin or star candles in Hamilton <sup>603</sup> county, state of Ohio, or at any other place whatsoever in the United States. The covenant was regarded as divisible, and that that part of it which bound Lange not to pursue the business, or give his assistance at any place in the United States, was void, being in general restraint of trade; but, as to Hamilton county, it was held, that if it were attended with certain other necessary requisites, it might be good. These requisites were stated to be: 1. That the restraint is partial; 2. That it is found on a valuable consideration; and 3. That the contract is reasonable and not oppressive, the presumption being always in the first instance that it is illegal, and must

be overcome by the party seeking to enforce it, before relief can be had. The presumption of illegality arises from the fact, that any restraint of the kind tends to oppression by depriving the individual of the right to engage in a pursuit or trade with which he is generally most familiar, and, consequently, the community of the services of a skillful laborer; and the general effect must be, more or less, to encourage idleness, and affect the price of such things as had been produced by his labor. These are the general reasons against any restraint of trade; and being founded in the nature of things, cannot be materially varied by any change in the times and circumstances of a people. The judge however, in delivering the opinion in the above case, says, that: "No case is found where such a contract has been upheld, which covered the whole of England or a state of this Union"; such restraints are regarded as general. And it will be observed that, in the case before us, the restraint at the least is to the state of Ohio, and hence the agreement is <sup>604</sup> not capable of such a division as, under any circumstances, would make it a valid one. It is in general restraint of trade. In *Taylor v. Blanchard*, 13 Allen, 370, 90 Am. Dec. 203, where the restraint extended only to the state of Massachusetts, the court said: "We do not think the extent of the territory embraced in a state affects the principle. Whatever may be the extent of the state, the monopoly restricts the citizen from pursuing his business, unless he transfers his residence and his allegiance to some other state or country. Its tendency is to drive business and citizens who are skilled in business from this to other states. If one is not at liberty to carry on his business here, but is at liberty to do so elsewhere, he will be likely to go elsewhere, and employ others to go with him": And, see also, *Chappel v. Brockway*, 21 Wend. 157; *Dunlop v. Gregory*, 10 N. Y. 241, 244; 61 Am. Dec. 746; *Wright v. Ryder*, 36 Cal. 342; 95 Am. Dec. 186; *Homer v. Ashford*, 3 Bing. 328.

The doctrine of *Lange v. Werk*, 2 Ohio St. 519, was followed in *Thomas v. Miles*, 3 Ohio St. 274. There the restraint extended to carrying on the business in the city of Cincinnati, or any other point where agencies might be established. It was held that under the facts of that case, whilst the restraint as to Cincinnati was reasonable and might be sustained, yet so far as it attempted to prevent Miles from competing with any branch that Thomas might establish at any and all other places, it was clearly opposed to public policy and void. It was not departed from in *Morgan v. Perhamus*, 36 Ohio St. 517, 38 Am. Rep. 607.



There the restraint was partial. Mrs. Morgan carried on the business of a dressmaker in the town of Felicity, Clermont county, Ohio. She sold her business to another with the goodwill, and <sup>605</sup> bound herself not to carry it on in the same town, or at any place within such distance as would interfere with the business. Mrs. Morgan commenced to carry on the same business in Felicity and was enjoined. The goodwill being in general nothing more than the probability that the old customers will resort to the old place for the purpose of trade, it is apparent that, in this case, the restraint imposed was reasonable, being no more than was required to secure the goodwill of the business to the purchaser; and was not oppressive, as she was at liberty to carry on the same business outside of the limits to which the goodwill of her former business, carried on in Felicity, extended. Partial restraints on trade of this character have been generally sustained, and they are the only ones that have been in this state, or elsewhere, unless it be in a few modern instances to which we will hereafter refer.

But there is a particular feature in this contract, reflecting on its purpose and character that deserves notice, to wit, the statement to which the Fringelis are required to, and do assent, that the demand for the kind of goods they were then manufacturing was limited in quantity and restricted chiefly to particular sections of the country; and that plaintiff, who was then engaged in the same business, extensively, had ample facilities to supply the demand, "promptly and at reasonable prices." This was likely introduced for the purpose of showing the reasonableness of the contract; but, when analyzed tends more strongly to show, that its principal object was, not simply to acquire the defendant's business and its goodwill as an investment, but to purchase them out of business, that it might have a more complete monopoly of the entire <sup>606</sup> business of making rules; and, therefore, on principles of public policy, should not receive any aid from the courts in its enforcement. That the field is a limited one, only furnishes the more reason on the part of the public that it should not be engrossed by a single person; and the statement that it has the facilities to supply the public at reasonable prices, lacks perception of the real ground of objection. Certainly we are not called on to relearn how little human cupidity can be trusted when it has the opportunity to enrich itself at the expense of others. A disposition to overlook this feature, only shows how far, in some of the cases, we are getting away from the salutary principles of the common law, which never permitted

a person to occupy a position in which his duties were opposed to his interests. No one could be judge in his own case, nor, in a fiduciary capacity, buy of or sell to himself.

The case of the Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, is referred to by plaintiff, as supporting the validity of the restraint on trade imposed by this contract; and we are not disposed to controvert the claim. The defendant Roeber, who was engaged in the manufacture, and sale throughout the United States, of friction matches, sold his business with its goodwill to the plaintiff, engaged in the same business, and agreed that he would not at any time within ninety-nine years engage in the same business anywhere in the United States, with exception of the states of Nevada and Montana. In an action for a violation of the agreement the restraint was held to be reasonable. In this case and some others, the decision is acknowledged to be a departure from the well-established rule of the earlier decisions, notably *Mitchell v. Reynolds*, 1 P. 607 Wms. 181, followed and approved by *Ranney, J.*, in *Lange v. Werk*, 2 Ohio St. 519. In this case, and in those similar to it, the question seems to be considered as one wholly between the parties; and, if the restraint is no more than the purchaser requires as a protection to the enjoyment of what he purchased and for which the vendor received a fair consideration, then it is argued that there is no objection to the contract; because the limits of trade and commerce are now so great, under modern conditions, that a general restraint is not more than is reasonable to afford protection to the purchaser in his business. This, as we think, is fallacious, as it ignores the interest of the public in the question, which now, more than at any former time, is involved. All monopolies, combinations, and agreements of whatever nature, formed for the purpose of controlling the production and manufacture of commodities are generally considered against public policy, as thereby prices may be unreasonably increased to the consumer, and are almost uniformly entered into for such purpose. Heretofore the right of any trade or business to determine for itself the extent of production and the price that shall prevail, has been stoutly denied by the public. This can only be done by the government, and then only in extreme cases, amounting to a necessity. So general have these agreements become and their attendant evils, as to have arrested the attention of the legislatures of some of the states; and laws have been passed to correct, as far as possible, the evils. And in 1890 the Congress of the United States passed an act, known as

the Sherman law, to protect trade and commerce against unlawful restraints and monopolies. In construing this act, the supreme court, <sup>608</sup> in *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 328, held that under its provisions, any restraint of trade affecting the interstate trade and commerce of the United States, is invalid. It had been claimed in argument that it only included such contracts in restraint of trade as were unlawful at common law. These statutes give emphasis to what has been heretofore regarded as a sound public policy by the courts.

But beyond this there is still another consideration connected with such monopolies and combinations, that is not to be overlooked from the standpoint of sound political wisdom and economy. It is to the interest of the republic that there should be, measurably, an equality in the fortunes of its citizens, and one of the best modes of accomplishing this, without the use of arbitrary means, is by encouraging separate and independent employments and discouraging by law and its administration in the courts, all tendencies to the concentration of property in the hands of the few—a condition in which there will be a constant unrest and dissatisfaction among the masses, that can bode no good to the nation. It may be safely affirmed, that free institutions cannot long be maintained among a people, where a few, possessed of great wealth, are the employers, and the many are mere laborers, wholly dependent on wages as a means of supporting themselves and families. These considerations, and others of a like character, constitute in great measure, that sound public policy which looks with distrust upon all agreements in restraint of trade; and particularly such as may be used in the formation of monopolies, and the control, by a few, of all individual pursuits.

<sup>609</sup> Therefore contracts whereby men are purchased out of their business and restrained from carrying it on anywhere else, should receive no aid from the courts. No more efficient method could be devised for the creation of a monopoly in any business. It simply requires a combination of persons possessed of a large amount of capital, for the purpose of engaging in a particular business, and purchasing that of all others engaged in the same business, and binding them not to engage in the same business anywhere else. Among the various methods adopted for the purpose of engrossing a particular business, this seems to have become a quite favorite one, when the business may be, and generally is, carried on by individuals on a limited



capital; for the reason, no doubt, that in such cases, it is easier to accomplish the desired result in this way, than by the formation of a trust through which an entire business may be carried on—each separate owner as a beneficiary of the trust, receiving its, or his, proportion of the net earnings. To say in such cases that the vendor should be bound not to carry on his business because he has received an adequate consideration for his agreement, is no answer to the objection that the agreement tends to foster the formation of a monopoly and is therefore against public policy.

The reasoning of the cases in which a departure from the common law had been adopted, fails to persuade us that we should disregard the rule that has been so long settled in this state by the decisions of this court; on the contrary, the changed conditions, on which the argument proceeds, <sup>610</sup> tend the more strongly to convince us that, in the interest of a wise public policy, it should be more firmly adhered to.

Judgment affirmed.

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**CONTRACTS IN RESTRAINT OF TRADE—VALIDITY OF—RESTRAINING COMPETITION.**—The older cases attempting to fix arbitrary geographical bounds beyond which a contract to forbear from competition would not be enforced, have given way to the more rational idea of making every case dependent upon the surrounding circumstances, showing the extent as to time and territory of the protection needed: *Cowan v. Fairbrother*, 118 N. C. 406; 54 Am. St. Rep. 733, and note. Contracts in restraint of trade are not necessarily void by reason of universality of time or of place: *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484; 49 Am. St. Rep. 784, and extended note. While contracts in general restraint of trade are against public policy and void, those in partial restraint, if founded upon a valuable consideration and reasonable in their operation, are valid: *McCurry v. Gibson*, 108 Ala. 451; 54 Am. St. Rep. 177. One may sell his stock in trade and goodwill, and make a valid contract with the purchaser binding himself not to engage in the same business in the same place for a time named: *Chapin v. Brown*, 83 Iowa, 156; 32 Am. St. Rep. 297, and note. In any case the effect of the agreement upon the interests of the public offers the best test of its validity: *Texas etc. Oil Co. v. Adoue*, 83 Tex. 650; 29 Am. St. Rep. 690; *Gamewell Fire Alarm etc. Co. v. Crane*, 160 Mass. 50; 39 Am. St. Rep. 458.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**PENNSYLVANIA.**

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**DELAWARE AND HUDSON CANAL COMPANY v. HUGHES.**

[183 PENNSYLVANIA STATE, 66.]

**MINES AND MINING—ADVERSE POSSESSION—STATUTE OF LIMITATIONS.**—If there is no severance of coal from the surface an adverse entry upon the surface extends downward and draws to it a title to the underlying minerals. Hence, in such case, he who disseises another and acquires title by the statute of limitations, succeeds to the estate of him upon whose possession he has entered. But if such severance has been made before his entry, and he has notice of that severance, either by the record, or by the state of the possession acquired both by observation and by years of service in the employment of the owner, his entry upon either of the estates does not affect the other.

W. H. Jessup and J. H. Torrey, for the appellants.

S. J. Strauss, Ward and Horn, J. A. Davis, T. P. Duffy, and J. T. Lenahan, for the appellees.

<sup>68</sup> **WILLIAMS, J.** This case presents a question of considerable importance to the owners of mineral lands, which does not seem to have been decided by the courts or to have been discussed by textwriters, so far as we have been able to discover. It will be readily understood from a brief statement of the facts out of which it arises. The plaintiff company is engaged in mining and selling anthracite coal. As early as 1825 it was the owner of a considerable body of contiguous lands which had been purchased by it because of the coal underlying it. A tract known as the "Porter tract," containing two hundred acres, was part of this body of coal land. The coal upon it was opened by the company at some time between 1830 and 1835, and mining operations <sup>69</sup> begun under it. From that time to the pres-

ent the company has been in the possession of its mineral deposit under the surface of the Porter tract by actual mining and by the use of the openings and gangways for purposes connected with the removal of coal from adjoining lands belonging to it. The defendant derives his title from one Alexander McDonald, who was an employé of the plaintiffs, and who entered upon the surface of the Porter tract in 1836 or 1837 and began a residence upon, and the cultivation of, a small portion of it. It does not seem to admit of serious doubt that from 1850, and perhaps somewhat earlier, down for a period of more than twenty-one years, the possession of McDonald and his vendees of the land in controversy has been open, notorious, hostile, and exclusive. As to the surface, therefore, the defendant has acquired a title under the statute of limitations. The question raised by this record is whether he has also, under the circumstances just stated, acquired a title to the underlying coal. The general principles regulating the titles to upper and lower estates in the earth's crust are pretty well settled by our own cases. The ownership of the surface carries with it, if there be no obstacle to the application of the general rule, title downwards to the center of the earth and upwards indefinitely. So long as mineral deposits remain in place they are part of the freehold, and pass with it by deed, gift, or other form of conveyance; but when the minerals are removed from their position or bed by mining they become personal property, and are sold like other personal chattels. If the owner grants to another the right or privilege of taking coal from his lands this grant, if not an exclusive one, is not the grant of an interest in land, but of an easement or incorporeal right which leaves the title to the coal in place remaining in the grantor. But a grant of all the coal, or of the exclusive right to mine the coal, is a sale of the coal in place.

The conveyance of the coal creates in the vendee an interest in land. The deed or other conveyance is within the recording acts, and is subject to all the rules and regulations governing conveyances of the surface. It may convey an estate in fee simple in the coal or other mineral, or any lesser estate, in the same manner and by the same words of grant made use of in conveyances of the surface. When such a conveyance has been <sup>70</sup> made of the coal or other mineral it works a severance of the estate so conveyed from the surface, and if the deed be recorded it is constructive notice to all the world of the fact of severance. Thenceforward the owner of the soil may cultivate, inclose, and



reside upon his estate for any length of time, but his possession will not extend below it. It will not grasp or affect in the slightest degree the estate below him which has been severed by the deed. In like manner the owner of the mineral estate may enter upon and operate it while the owner of the surface is leaving his estate unoccupied and wild, but the possession of the lower estate will not reach upward and attach to the surface. Each estate may be occupied, conveyed, incumbered, sold by the sheriff, or allotted in partition, without any effect upon the other. If a trespasser enters either estate and maintains possession, he can acquire title by the statute of limitations after twenty-one years to so much as he has actually held for that length of time; but his title will not extend above or below the estate on which he enters. If he would acquire any part of the mineral he must make his entry upon, and maintain his position within, the limits of the mineral estate, for the requisite period of time in an open, notorious, exclusive, and continuous manner: *Caldwell v. Copeland*, 37 Pa. St. 427; 78 Am. Dec. 436; *Armstrong v. Caldwell*, 53 Pa. St. 284; *Kingsley v. Hillside Coal etc. Co.*, 144 Pa. St. 613. A covert or clandestine entry will not do. Such an entry will confer no right on the wrongdoer until his entry is, or by the exercise of due diligence might be, discovered by the owner. Until then the owner cannot know that his possession has been invaded. Until he has, or ought to have, such knowledge he is not called upon to act, for he does not know that action in the premises is necessary, and the law does not require absurd or impossible things of anyone: *Lewey v. Fricke Coal Co.*, 166 Pa. St. 536; 45 Am. St. Rep. 684; *Scranton Gas etc. Co. v. Lackawanna Iron etc. Co.*, 167 Pa. St. 136. Possession, to be adverse, must be open as well as continuous. The intruder must keep his flag flying in a visible and hostile manner: *Plummer v. Hillside Coal etc. Co.*, 160 Pa. St. 483. So far on in our inquiry we have a well-beaten path to travel, but from this point forward we are without any definite landmark to guide us. The real question presented is, May there be a severance of the mineral estate from the surface by the acts of <sup>71</sup> the owners of the original freehold? And, if so, may there be notice in fact of such severance to other persons that will affect them in the same manner as the constructive notice arising from the recording of a deed? It is very clear, as we have seen, that if the deed to the plaintiffs had been for the coal under the "Porter tract" only, the entry of McDonald upon the surface and his inclosure of a part of it would have had no

effect upon the lower estate. The rule is well settled by the cases cited above. The reason of the rule is that the sale of the coal severed it from the surface, and the recording of the deed gave constructive notice to McDonald of such severance, whether he had any knowledge of it or not. But the plaintiff's deed was for the whole of the land, including the soil and the minerals.

The company had the right, however, to develop and operate the mineral estate alone, if that was to its interest, and leave the surface untilled and uncleared. It elected to do so. It erected its breaker, opened its mine, extended its gangways, arranged its tracks and sidings, and began the production of coal for the market from beneath the surface of the "Porter tract" and its adjoining lands. In this manner it entered upon the actual possession of its mineral estate. For more than sixty years it has continued its possession without interruption in a manner that has been obvious to all persons in the neighborhood. No person could pass or enter upon the land without being confronted with the unmistakable proofs of the possession and active operations of the plaintiff company in this, its subterranean estate. These proofs, including the structures, the culm piles, the prepared coal, the movements of men and cars about the pit's mouth, brought the knowledge of the plaintiffs' operations to even the most casual observer, in a much more effective and satisfactory manner than it could have been done by the mere existence of a recorded deed. Why should it not have the same legal effect? In this case there is still another element of notice; for the defendant not only made his entry upon the surface with full knowledge from the acts of the owner of his severance and the occupancy of the lower estate by it, but he was in its employ, assisting in its mining operations. He was one of the persons by whose labor the plaintiff company preserved its possession and kept its own flag flying. Surely notice could go no farther than this. The recording of a deed is <sup>72</sup> notice, notwithstanding the party to be affected by it may never have known of its existence or of the severance wrought by it, because he might have known if he had exercised the vigilance the law requires of him, and examined the record. So, it is well settled, possession is notice, although the person to be affected did not know of it. It was his duty to take notice of the possession as well as of the record, and if he failed to do it, it was his folly. He is held to know, because he might have known if he had made the examination which it was his duty to

make. Here the possession of the owner was known. The estate in which it was at work was known; and the defendant was in its service, contributing by his own labor to the development of the mineral estate and to the maintenance of his employer's possession. This was notice by, and because of, the clearest knowledge of all the facts. McDonald had this knowledge when he first entered upon the surface, and he was affected by it. He knew of the actual severance of the estates in the Porter tract. He knew the owner was in the exclusive possession of the lower one, and himself assisted as an employé in the work by which that possession was made visible and notorious. He never did anything to challenge its possession of the mineral estate. On the contrary, all he did, aside from the erection of a shelter on the surface, was as servant of the owner, under its direction, and in the clearest recognition of, and subserviency to, its title. Under such circumstances it is plain that if he acquired a title to the surface of the six acres he claims, he could not clutch also the mineral estate, or any part of it that lay below the surface.

It would be inequitable and unjust to hold otherwise in this case. He had stolen in upon the surface while at work for the company that owned both it and the coal. He knew of the severance in fact of these estates, and aided in the general work that made the severance evident to the world. If entering under such circumstances he could acquire the surface, he is limited to it. Knowing all the facts he was bound, if he desired to acquire title to his employer's mine or any part of it, to enter upon the mineral estate at some point, take possession, hold it openly and adversely for twenty-one years, so that his position and claim could have been known to the owner. Any different holding would lead to very absurd results. It would require <sup>73</sup> us to hold that constructive notice is better than actual notice. Even this is short of a full statement of the result of the contrary doctrine, for in reality it would require us to hold that notice in fact had no significance and bound no one. If McDonald was not bound by the complete knowledge he possessed, and the opportunity for inquiry which his relations to the owner afforded him, it would follow that actual knowledge did not so much as put him upon inquiry. It would be much more reasonable to strike down the constructive notice which the law raises from the recording of a deed than thus to put it out of the power of an owner to protect himself by the clearest disclosure of his possession of his estate, and its purpose, to one



of his own employés. But it is said that the company was not engaged in mining immediately under the six acres of surface occupied by McDonald, and that there was considerable unmined coal in place directly below his inclosure. McDonald entered upon the surface of the Porter tract, knowing of the severance of the coal under it from the surface. The plaintiffs' mineral estate was protected as fully by this actual knowledge as it would have been by constructive notice; and no title by the statute of limitations could be acquired within the limits of that estate without an entry upon it. An entry upon another estate, that upon the surface, can have no effect outside the estate entered. If there is no severance an entry upon the surface will extend downward and draw to it a title to the underlying minerals; so that he who disseises another and acquires title by the statute of limitations will succeed to the estate of him upon whose possession he has entered. But if a severance is made before his entry, and he has notice of that severance, either by the record or by the state of the possession acquired both by observation and by years of service in the employment of the owner, his entry upon either of the estates will not affect the other. Possibly the question of the extent of the possession of a trespassing miner acquired by reason of his entry upon the mineral estate may sometime be presented. If so it will be time to consider it when it comes before us. It is not in this case. As applicable to the facts now before us, we hold that the Porter tract, or so much of it as was accessible from the pit's mouth in use, so that coal could be mined and removed therefrom by the ordinary methods of mining, was in the actual<sup>74</sup> possession of the plaintiffs, and that no inclosure upon the surface of that tract by one who had notice of the severance would draw to it any part of the mineral estate within its limits. This disposes of the suggestion that the unmined coal under the six acres has been, or could be acquired by McDonald by virtue of his possession on the surface. He acquired the surface because he put his actual possession against the constructive possession of the owner. He did not acquire the coal because he had actual notice of its severance from the surface by the owner. This limited his possession to the estate on which he entered. These views require us to reverse the decree of the court below, to restore the preliminary injunction, and, upon the facts that are undisputed, to make the injunction perpetual. The costs of this appeal to be paid by the appellees.

**MINES—SEVERANCE OF TITLE TO SURFACE AND MINERALS UNDERNEATH—ADVERSE POSSESSION.**—The surface of land and the minerals underneath may be dissevered in title and become separate tenements: *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. St. 293; 24 Am. St. Rep. 544, and extended note. *Prima facie* the owner of the freehold has a right to the mines and the minerals underneath, but this is only a presumption of law that may be rebutted by showing a distinct title to the surface in one, and to that which is underneath in another: *Riddle v. Brown*, 20 Ala. 412; 56 Am. Dec. 202. Possession of the surface of land for more than twenty-one years does not carry with it the possession of minerals below it, where the title to the latter had been severed from that of the surface by deed: *Caldwell v. Copeland*, 37 Pa. St. 427; 78 Am. Dec. 436, and note.

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## *SAYLOR v. PENNSYLVANIA CANAL COMPANY.*

[183 PENNSYLVANIA STATE, 167.]

**CORPORATIONS—PUBLIC DUTIES—BILL TO ENFORCE.** A bill in equity to enforce the performance of public duties by a corporation cannot be maintained by a private party in the absence of a special right or authority.

**CORPORATIONS—RIGHT OF PRIVATE PARTY TO ENFORCE PUBLIC DUTIES.**—A private party cannot maintain an action to recover damages from a canal company for failure to reconstruct part of its canal destroyed by flood, on the ground that he is thus prevented from using his canal boat at a profit. The right to demand and compel the canal company to reconstruct its canal is a public right alone, and no private citizen can enforce it without special injury to himself.

Trespass to recover damages alleged to have been sustained by reason of the negligence of the defendant in not keeping in good repair that part of its canal, known as the Juniata division and extending from Millerstown dam to Newton Hamilton dam, a distance of fifty-four miles, within a reasonable time, after June 1, 1889, at which time said part of such canal was destroyed by a disastrous flood. Plaintiff was at the time mentioned the owner of a canal boat and engaged in the business of boating therewith. He had established a regular, and certain trade upon that division of the canal in question by which he was enabled to make large gains and profits with his boat. The failure of the defendant company to keep the said portion of its canal in good repair and navigable condition rendered plaintiff's boat almost valueless and destroyed the greater part of his business. The statute referred to in the opinion provided that the said canal company, "shall be bound ever after to keep in good repair and operating condition the line of said canal," including the division in question, and the

same shall be and remain forever a public highway for the use of all persons or companies engaged, or wishing to engage, in the business of the transportation of tonnage or passengers, they first paying just and fair charges therefor." Verdict and judgment for defendant. Plaintiff appealed.

W. H. Sponsler, for the appellant.

B. F. Judkin and L. E. Atkinson, for the appellee.

**172** McCOLLUM, J. It was held in *Buck Mountain Coal Co. v. Lehigh Coal etc. Co.*, 50 Pa. St. 91, 88 Am. Dec. 534, that a bill in equity to enforce the performance of public duties by a corporation cannot be maintained by a private party in the absence of a special right or authority. Thompson, J., in delivering the opinion of the court said: "There are many authorities in England and in this country which deny the right of private parties, in their own names—in the absence of special laws—when their interests are only in common with the public, to compel the performance of a duty to the public. The reason is that if one individual may interpose, any other may, and as the decision in one individual case would be no bar to any other, there would be no end to litigation and strife. The general laws of order, so necessary to good government, forbid anything like this." It follows from the decision in the case cited that the plaintiff in the case under consideration cannot maintain an action to compel the performance by the Pennsylvania Canal Company of the duty imposed by the act of May 16, 1857: Pub. Laws, 519. The commonwealth may compel it, but a private citizen cannot. The learned counsel for the plaintiff concedes this much, but contends that a party who is injured by the company's neglect to perform it may have an action for damages. The duty of the defendant company undoubtedly was to keep the canal open and in repair as a public highway, "for the use and enjoyment of all parties desiring to use and enjoy the same." That portion of the Juniata division of the canal to which the contention of the plaintiff relates was virtually destroyed by the flood of 1889. It has not been navigable since, and the company has made no effort to reconstruct it. It extends from the Millerstown **173** dam to the Newton Hamilton dam, a distance of fifty-four miles. No claim is made that prior to the flood referred to the company was remiss in the performance of its duty to keep this canal in repair. It was not therefore responsible for injuries occasioned by the flood: *Pennsylvania R. R. Co. v. Patterson*, 73 Pa. St. 491, and *Pennsylvania Canal Co. v. Burd*,



90 Pa. St. 281, 35 Am. Rep. 659. The plaintiff's boat was not destroyed or injured by the flood or by the failure of the defendant company to reconstruct the canal between the points above mentioned. He could not after the flood use his boat for the transportation of goods and passengers between these points, nor could any other lessee or owner of a boat use his for a like purpose. The business in which the plaintiff was engaged was open to all persons using or desiring to use the canal for the purpose for which it was constructed. The privilege he exercised and enjoyed was not special or peculiar, nor was the injury he alleges he sustained by the neglect or failure of the company to repair or reconstruct the highway it was required as a purchaser to maintain. The privilege was such as any person who chose to exercise it was entitled to, and the injury done by the abandonment of the highway was not to the plaintiff alone, but to him in common with the public. The difference, if any, was only in degree, and this will not sustain his suit.

The cases cited by the plaintiff from our own reports are plainly distinguishable in their facts from the case under consideration, and are not applicable to it, as an examination of them will clearly show. It follows from what has been said that the learned court below did not err in directing a verdict for the defendant.

Judgment affirmed.

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**CORPORATION—PUBLIC DUTIES—LIABILITY FOR NON-PERFORMANCE—MANDAMUS.**—In an action against the proprietors of a canal who were bound by their act of incorporation to construct their canal so deep and wide that rafts of a certain description could pass through, when these could pass the river with which it was connected; it was held that they were liable to the owner of a raft of such description, for which they had received toll, for all the damages he sustained in consequence of the canal not being sufficient to allow the passage of the raft, without evidence that it could have passed the river: *Riddle v. Proprietors*, 7 Mass. 169; 5 Am. Dec. 35. See, also, *Thayer v. Boston*, 19 Pick. 511; 31 Am. Dec. 157, and note. Mandamus is the usual method of compelling corporations to perform their duties, and may issue for the benefit of private persons as well as for the public: *Monographic note to City of Potwin Place v. Topeka Ry. Co.*, 37 Am. St. Rep. 318, 319.

## COMMONWEALTH v. PITTSBURG.

[183 PENNSYLVANIA STATE, 202.]

**MUNICIPAL CORPORATIONS—APPROPRIATIONS BY—CONSTITUTIONAL LAW.**—Under a constitutional provision forbidding a municipality "to appropriate money or loan its credit to any corporation, association, institution, or individual," a city has the right to appropriate money to a committee of citizens appointed by a chamber of commerce and ratified by the city authorities to defray the expenses of a survey for a ship canal, and for securing information as to the practicability and benefit to be derived by the city from such canal.

J. H. Beal and C. Burleigh, for the appellants.

J. W. Kinnear, J. C. Slack, and J. E. Shaw, for the appellee.

**203 WHITE, J.** This case comes before us on an amicable submission, to decide the legal questions involved. The original petition, answer, and demurrer were filed the same day, January 22, 1897. At the hearing certain facts seemed to be necessary to a proper decision of the case, and the relators were allowed to amend. The amendment, answer thereto, and demurrer were filed at the same time, March 13, 1897, and the case submitted for final disposition.

The relators were "The Provisional Committee of the Lake Erie and Ohio River Ship Canal," appointed in pursuance of a resolution of the board of directors of the chamber of commerce of the city of Pittsburg, passed July 2, 1894, for determining the practicability of such a canal, and the benefits and advantages that would accrue from it to the trade and industries of Pittsburg, and if found such, to secure a corporation of private capital to undertake it, or the national government to undertake it. Pursuant thereto the committee raised, by voluntary subscriptions, twenty-nine thousand dollars, which were expended in the employment of engineers, gathering statistics, etc., and were unanimously of opinion that the proposed canal "was entirely practicable and feasible, and would be of inestimable value to the city of Pittsburg and its citizens, by increasing the trade and commerce of said city." Finding that the fund voluntarily subscribed was not sufficient to complete their work, and "to remove all doubts as to the practicability of the project, and to establish clearly its great utility to the commerce, trade, and industries of the city of Pittsburg," they wished "to employ impartial experts to test and examine the work and to complete the work in the most perfect detail," and for that purpose appeared before the councils of the city, "and gave a full explanation and history of their work done, and stated that the

money requested was to be used by the committee in completing their work in the most <sup>204</sup> perfect and detailed manner," and the necessity and great utility of such a canal for the people of Pittsburg. Thereupon the councils of the city unanimously passed an ordinance, July 11, 1895, which was duly approved by the mayor, for the appropriation of ten thousand dollars out of the revenues of the city for the fiscal year, commencing February 1, 1896, "to be expended solely for the purpose of the provisional committee of the Lake Erie and Ohio River Ship Canal, a public improvement and highway designed to promote the commercial interests of the city; the sum, or so much thereof as shall be required, shall be paid by the controller, upon proper vouchers and affidavits presented and made by the chairman of said committee, to the treasurer thereof, and shall be charged to appropriation No. ."

The relators say that, "relying upon the faith of said ordinance and appropriation, they subsequently entered into contracts, and expended in carrying out the work contemplated, requiring the sum of seven thousand five hundred dollars (five thousand dollars yet remaining unpaid), two thousand five hundred dollars being advanced by the relators, and that in addition thereto, some fifteen hundred dollars will be needed for publishing the reports, etc., making a total of nine thousand dollars, which will be necessary to finish the work." That on application to H. I. Gourley, the controller, for the certificate for a warrant for the appropriation, he refused to issue the same, for reasons stated in his letter of June 5, 1896, addressed to the chairman of the committee, in which he says: "I very reluctantly decline to issue the certificate. . . . The conclusion which I am compelled to reach is based on a provision of the state constitution, which I am advised prevents the use of public money for the purpose designed. I can see no way, at the present time, by which the money can be placed in the possession of your committee."

At the argument on the original petition, answer, and demurrer, it was further urged that the relators had not presented vouchers and affidavits, as required by the ordinance of July, and also that all appropriations, under the general ordinances of the city, must be made at the beginning of the fiscal year, in January or February. It was claimed by the relators that they had given or would give the vouchers, etc., and also that in the annual appropriation ordinance of February, 1896, this specific sum of ten thousand dollars was included. The relators were



permitted to amend on these points. The amendment filed March 13, 1897, <sup>205</sup> showed a compliance as to the vouchers and affidavits, and also the general appropriation ordinance of February, 1896, containing this item: "47. Lake Erie Ship Canal, \$10,000." The ordinance is headed: "Appropriations for 1896. The following sums of money are hereby specifically appropriated for the purposes hereinafter set forth."

In the answer of the controller to the amendment, he denies that the ten thousand dollars in the ordinance of February, 1896, should be paid to the relators, because it is "an appropriation made to and for a different and distinct body entirely, namely, the Lake Erie Ship Canal." If the answer raised a question of fact, it would have to be referred to a jury. But I do not understand that the controller raises a question of fact, but a legal question upon the words of the ordinance. In considering this question we must take into consideration all the circumstances. It is not alleged that there is any corporation or association by the name of the "Lake Erie Ship Canal." If there is none such, then the appropriation could not have been intended for a nonentity. The appropriation in the ordinance of February, 1896, was manifestly intended to refer to the ordinance of July, 1895. That ordinance did not appropriate the money at that time, for it expressly provided it shall be paid out of the revenues of 1896. The ordinance of February, 1896, was intended to carry out the ordinance of July, 1895. It is for the precise sum, and there is no appropriation to the provisional committee. The object is the same in both ordinances. It was suggested in the argument that possibly the city might have to pay the sum twice. Perhaps that was a good reason for raising the question. But certainly the city is in no danger. There is no body now in existence that can claim this money, as the "Lake Erie Ship Canal." No doubt if the money be paid to the relators under the order of court the city will be fully protected, especially as no body or person representing the "Lake Erie Ship Canal" has appeared for more than a year to claim this money. When the controller wrote his letter to the committee, June 5, 1896, doubtless he knew of the appropriation in the ordinance of February, but he did not give that as any reason for refusing to certify a warrant; nor does he refer to it in his answer to the original petition, filed January 22, 1897.

The other, and perhaps the main question in the case, is the <sup>206</sup> one raised in the controller's letter to the committee. Had the councils power to make the appropriation? The section of

the constitution referred to (article 9, section 7) is in these words: "The general assembly shall not authorize any county, city, borough, township, or incorporated district to become a stockholder in any company, association, or corporation, or to obtain or appropriate money or loan its credit to any corporation, association, institution, or individual." The principle of this section is not new. It is substantially the same as an amendment to the constitution of 1837, adopted in 1857. It is the same as in the constitution of Ohio. The city of Cincinnati, under an act of the legislature of that state providing that cities of the first class, when a railroad was material to the development of a city, might contract a loan and build a railroad, actually built a railroad entirely outside of the state of Ohio, except the bridge over the Ohio river, which connected it with the city. The supreme court of Ohio gave an interpretation to that section of their constitution: *Walker v. Cincinnati*, 21 Ohio, 52-54; 8 Am. Rep. 24. Our supreme court, in *Wheeler v. Philadelphia*, 77 Pa. St. 338, adopted the interpretation of the supreme court of Ohio, as contained in the opinion of Scott, Chief Justice, by this quotation: "The mischief which this section interdicts is a business partnership between a municipal or subordinate division of the state, and individuals or private corporations or associations. It forbids the union of public or private capital or credit in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders, nor furnish money or credit for the benefit of the parties interested therein. As this alliance between the public and private interests is clearly prohibited in respect to all enterprises of whatever kind, if we hold that these municipal bodies cannot do on their own account what they are forbidden to do on the joint account of themselves and private parties, it follows that they are powerless to make any improvements, however necessary, with their own means, and on their own sole account. We may be very sure that a purpose so unreasonable was never entertained by the framers of the constitution."

In this case the city of Pittsburg does not propose to build <sup>207</sup> the canal, or to loan or appropriate money for that purpose, or to join with any person, association, or corporation for that purpose. It simply appropriates ten thousand dollars—a very small sum for the city in view of the great object aimed at—for

surveys, getting information, etc., to ascertain whether a ship canal between Pittsburg and Lake Erie is practicable, and would be a benefit to the city.

That such a ship canal is practicable, and would be of very great benefit to the trade and industries of Pittsburg, must be taken as true, in this case, for the provisional committee so reported, and it is so stated in the ordinance of July 11, 1895, and is not controverted by the controller in his answers. There can be no doubt, if practicable, it would be of immense importance to Pittsburg to have a ship canal from here to Lake Erie.

It is objected that the provisional committee was appointed by the chamber of commerce, and not by the city. That is true in one sense. But they are all citizens and business men of the city. It was evidently proper for the chamber of commerce, the incorporated body representing the commerce and business of the city, to take the initiative in the matter. Besides, the committee appeared before councils, giving a history and explanation of the project, what they had done, and what they proposed doing, and in view of those facts the councils unanimously passed the ordinance of July, 1895, thus sanctioning the investigation, and indorsing the appointment of the committee.

The objection that the canal would be outside the boundaries of the city, I do not think is entitled to much consideration. There can be no doubt the city could establish gasworks or waterworks beyond the city limits to supply the citizens with gas and water; or could purchase and erect a poorhouse outside of the city limits, which was recently done. And in that case some expense was incurred in ascertaining a good location.

The real question is, Was a preliminary investigation as to the feasibility of a ship canal, connecting Pittsburg with Lake Erie, and its advantages to Pittsburg, a proper subject for the councils to inquire into and appropriate a reasonable sum for that purpose. If so, I have no doubt of the power of the councils to make the appropriation. There is no complaint of the amount appropriated in this case. It is certainly very reasonable, as the relators, by private subscriptions, had raised and expended for <sup>208</sup> that purpose twenty-nine thousand dollars before they asked councils to appropriate the ten thousand dollars.

There is another and good reason why the relators should have this money. The ordinance of July, 1895, pledged the city for ten thousand dollars. No objection was made to it by the controller or any other citizen until the controller refused to



certify a warrant, in June, 1896, nearly one year after the passage of the ordinance. In the mean time, on the faith of that ordinance, the committee contracted debts in carrying out the very object declared in the ordinance, and actually advanced two thousand five hundred dollars. Shall they suffer this loss, or the city pay what it promised to pay them, on the faith of which they incurred the expense? Even if there is a doubt about the power of the city to pass the ordinance of July, 1895, or some legal irregularity in the ordinance of February, 1896, good faith and common honesty would require the city to pay.

The relators have incurred debts, for which proper vouchers have been furnished, to the amount of seven thousand five hundred dollars. They can only ask for a certificate for that amount at this time. The reports and statistics should undoubtedly be printed for public information. The city would otherwise lose the entire fruits of the investigation. The committee are of opinion it will require fifteen hundred dollars more for that purpose. When these are printed it will be time enough to ask for another certificate.

The following decree was entered: And now, March 18, 1897, this case came on to be heard, and was argued by counsel, and upon due consideration thereof, it is ordered, adjudged, and decreed that a writ of peremptory mandamus issue upon H. I. Gourley, controller of the city of Pittsburg, directing him to issue and approve a warrant to the provisional committee of the Lake Erie and Ohio River Ship Canal, for the payment to them of the sum of seven thousand five hundred dollars, as set forth in the sworn statement, filed by John B. Jackson, treasurer of said committee, with the said controller.

**209 PER CURIAM.** It is unnecessary to refer in detail to the facts of this case. They sufficiently appear in the pleadings and in the opinion of the court below; and for reasons given in that opinion, we think the decree should not be disturbed. The case is clearly not within the inhibition of section 7, article 9, of the constitution. The appropriation was a very reasonable one; and the purpose for which it was made was certainly not foreign to the material interests and general prosperity of the municipality, but quite the contrary. We are therefore of opinion there was no error in holding that councils had the power to make the appropriation, and that good faith to the relators and others who acted in reliance thereon requires that the sum thus appropriated should be paid.

Decree affirmed and appeal dismissed at appellants' costs.

**MUNICIPAL CORPORATIONS—POWER TO MAKE APPROPRIATIONS.**—A city has no power to loan its credit, or make its accommodation paper for the benefit of citizens to enable them to execute private enterprises: *Clark v. Des Moines*, 19 Iowa, 199; 87 Am. Dec. 423. A reasonable appropriation by a city to a corporation organized to create a fund to pension its members who are policemen, is an appropriation to a strictly municipal use and necessary for the welfare and comfort of the city, and not in violation of a constitutional provision prohibiting the legislature from authorizing any city "to become a stockholder in any company, association, or corporation, or to obtain, or appropriate money, or to loan its credit to any corporation, association, institution, or individual": *Commonwealth v. Walton*, 182 Pa. St. 373; 61 Am. St. Rep. 712, and note.

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### STROUP v. RAYMOND.

[183 PENNSYLVANIA STATE, 279.]

**EXECUTIONS—SHERIFF'S SALES—SETTING ASIDE.**—The setting aside, or refusal to set aside, a sheriff's sale, is in the sound discretion of the lower court, and unless there is a manifest and gross abuse of that discretion, the appellate court will not disturb the decree.

**JUDICIAL SALES.—SHERIFF'S SALES** cannot be set aside for mere inadequacy of price.

**JUDICIAL SALES—SHERIFF'S SALES—ABUSE OF DISCRETION—INADEQUACY OF PRICE.**—A decree of the lower court setting aside a sheriff's sale for mere inadequacy of price, is an abuse of discretion, and may be reversed on appeal.

**EXECUTIONS—SHERIFF'S SALES—SETTING ASIDE FOR MUTUAL MISTAKE.**—A sheriff's sale is properly set aside when it appears that all of the parties interested mistakenly supposed that the purchase was subject to a mortgage, which belief caused the property to be sold for a grossly inadequate price.

B. L. Forster and J. E. Snyder, for the appellant.

M. W. Detweiler, for the appellee.

**281 DEAN, J.** Charles N. Raymond borrowed from Anna H. Stroup two thousand dollars, and to secure the loan, executed to her a mortgage in that sum on a lot of ground and dwelling-house in the borough of Middletown. The value of the property was not less than two thousand five hundred dollars. A judgment bond accompanied the mortgage; default having been made by Raymond in payment of the debt and interest, judgment was entered on the bond, execution issued, and the mortgaged property seized and sold by the sheriff on December 30, 1896, to Wilmer Crow, this appellant, at his bid of four hundred dollars. There were other bidders, but it is found as a fact by the court below, from the testimony, that all parties interested, which would include plaintiff, defendant, and purchaser, believed the sale was made subject to the mortgage. It appears

clearly from the testimony that Crow, the purchaser, until some time after the sale, assumed the property had cost him over two thousand four hundred dollars. It was then discovered that as the sale had been made on the bond the mortgage had been given to secure, the lot was discharged from the lien of the debt. This rule was then taken, at instance of an intending bidder, and plaintiff and defendant, before the sheriff's deed was acknowledged, to set aside the sale. A bond with ample security was tendered, to be filed in court, stipulating that on a resale a bid sufficient to cover mortgage, debt, interest, and costs would be made. After testimony taken, the court set aside the sale. The purchaser, Crow, appealed to this court, and counsel for plaintiff and defendant in the judgment now move to quash the appeal, assigning several reasons, only one of which we notice, viz: No appeal lies from the discretionary exercise of a power resting with the common pleas. It is settled that the setting aside or refusing to set aside a sheriff's sale is in the sound discretion of the court below; and unless there be a manifest and gross abuse of that discretion, this court will not disturb the decree. All our cases touching the question are so fully cited in the opinion of the superior court (Laird's Appeal, 2 Pa. Sup. Ct. 300) that we need not repeat them. And it is held in the same cases that this court may either affirm the decree or quash the appeal. But it may be argued that there was a manifest abuse of discretion here, because the learned judge of the common pleas sets out as a reason for setting aside the sale gross inadequacy <sup>282</sup> of price, which the law has settled is not of itself a sufficient reason. If this were the only reason on which the decree rested, the argument of appellant would be sound; clearly, it is an abuse of discretion, when, to reach a decree, the court itself overrides the established law. Substantially the same position was taken by the court below in Young's Appeal, 2 Pen. & W. 380, decided in 1831, as is taken by the court below in the case before us. All the judges concurred in dismissing Young's Appeal, because no appeal was given by the act of 1827; two of the judges, Ross and Gibson, C. J., wholly dissented from the reasons given by the court below for setting aside the sale; the other three judges declined to express an opinion as to this part of the case, because it had not been argued. But the opinion of Ross, J., concurred in by Gibson, C. J., has ever since been followed by this court as the law, and is conceded by the learned judge of the court below to have been the law so lately as Ritter v. Getz, 161 Pa. St. 648. But he



thinks "the time has arrived when the hoary pretense of 'seizing upon other circumstances' might safely be sent to keep company with the many other useless fictions that have been abandoned in the modern desire for a more straightforward administration of the law, and that the courts should admit that when the price is grossly inadequate, that of itself is a valid reason for setting aside a sheriff's sale."

We do not think this statement meets the reasoning in Young's Appeal, 2 Pen. & W. 380. The opinion there states: "The bona fide purchaser at a sheriff's sale of land, the moment it is knocked off to him, if he complies in all respects with the conditions of sale, instantly acquires a vested right to the property sold. Such a purchaser would be bound by his bargain thus made, although his bid greatly exceeded its value. And if he purchase at a bona fide sale, greatly below the value, the vendor would be bound by the sale. Equality, in this case at least, is equity." The opinion then goes on to show that any other rule would necessarily affect sheriff's sales very injuriously, because buyers would not attempt to purchase at such sales, when they could be set aside for mere inadequacy of price. We do not see that lapse of time has changed the rule that "equality is equity" into the opposite one, that inequality is equity. The same reasons for adhering to all other formal <sup>283</sup> solemn contracts exist where sheriffs' contracts are regular and made under no misapprehension as to material facts. We are clearly of the opinion that the rule was founded upon the soundest reason, and should be adhered to. If the decree of the court below had for its foundation only the reason that inadequacy of price was sufficient to set aside the sale, we would reverse it as a palpable abuse of discretion. But it also rests upon a much sounder one; the court states that all parties interested acted on the mistaken belief that the purchase was subject to the mortgage; this was such a mutual mistake as would in most cases relieve parties from the obligation of their contracts. Undoubtedly, courts have, in cases where the purchaser believed he bought the land discharged from the lien of a mortgage, relieved him from the obligation incurred by his bid, if he made prompt application before acknowledgment of deed. And, on the other hand, there is no reason here why this purchaser should get for four hundred dollars a property which he thought he was paying more than two thousand four hundred dollars for. This mutual misapprehension, coupled with inadequacy of price, warranted the decree, and therefore there was in fact no abuse of discretion.

There being no such abuse apparent from the record or averments of appellant, the appeal is quashed.

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**EXECUTION SALES—SETTING ASIDE FOR INADEQUACY OF PRICE.**—Mere inadequacy of price is not sufficient to avoid a sheriff's sale: *Hollister v. Vanderlin*, 165 Pa. St. 248; 44 Am. St. Rep. 657, and note. Yet when such inadequacy is very great, slight circumstances tending to show that interested parties were misled, or by accident or mistake prevented from attending the sale, or preventing it, it may be set aside: *Rogers etc. Hardware Co. v. Cleveland etc. Co.*, 132 Mo. 442; 53 Am. St. Rep. 494, and note. See *Griffith v. Milwaukee Harvester Co.*, 92 Iowa, 634; 54 Am. St. Rep. 573, and note; *Moran v. Clark*, 30 W. Va. 358; 8 Am. St. Rep. 66.

**APPEAL.**—Rulings of lower courts in matters resting entirely in their discretion will not be disturbed upon appeal, except where there is a refusal to exercise the discretion, or a flagrant abuse of it: *Winslow v. Minnesota etc. R. R. Co.*, 4 Minn. 313; 77 Am. Dec. 519; *Moody v. Fleming*, 4 Ga. 115; 48 Am. Dec. 210; *Commonwealth v. Eisenhower*, 181 Pa. St. 470; 59 Am. St. Rep. 670, and note.

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## BRADEN v. O'NEIL.

[183 PENNSYLVANIA STATE, 462.]

**DEBTOR AND CREDITOR—PREFERENCES—CONFESSION OF JUDGMENT.**—A debtor may secure his creditor by a confession of judgment in his favor.

**DEBTOR AND CREDITOR—PREFERENCES—CONTINGENT LIABILITY—CONFESSION OF JUDGMENT.**—An indorser of a note is contingently liable to the holder thereof and may secure him by a confession of judgment.

**DEBTOR AND CREDITOR—PREFERENCES—CONFESSION OF JUDGMENT—FRAUD.**—Confession of judgment by a debtor to secure a contingent liability to his creditor is not a fraud in law, and whether a fraud in fact depends on the surrounding circumstances.

**EXECUTIONS—SHERIFF'S SALES—AGREEMENT AS TO BIDDING—FRAUD.**—An agreement among a portion of the creditors to buy their debtor's property at sheriff's sale, and to manufacture and sell it, dividing the proceeds, is not fraudulent, if it does not prevent competition at such sale, nor depress the price.

C. Heydrick, W. A. Hindman, W. H. Hockman, H. R. Wilson, and C. Z. Gordon, for the appellant.

G. F. Whitmer, G. A. Jenks, B. J. Reid, and F. J. Maffet, for the appellee.

**465 WILLIAMS, J.** The verdict in this case was directed by the court as against the appellant bank and Rachel R. Pollard. Upon a motion for a new trial this verdict was set aside as to Rachel Pollard and a new trial granted, but the motion was refused so far as appellant was concerned, and judgment

entered on the verdict. Our question is not whether the defendants stood on substantially the same ground, but whether the reasons for directing judgment on the verdict are tenable. The facts are these: W. W. O'Neil was engaged in the manufacture and sale of lumber in Clarion county, and was in possession of a considerable amount of property. On the eighteenth day of April, 1893, his affairs were not in a prosperous condition, and he was very sick in the city of Pittsburg. His principal creditors and those whom he desired particularly to secure were his mother in law, Mrs. Pollard, and the First National Bank of Clarion. He was indebted to <sup>466</sup> the bank in the sum of seven thousand two hundred and forty-five dollars and seventy-five cents upon notes made by him and discounted for his credit, and in the sum of six thousand seven hundred and fifty-four dollars and seventy-seven cents upon notes indorsed by him, and largely, if not wholly, discounted for him and at his request. To secure the bank he executed a judgment note in its favor for the sum of twelve thousand five hundred dollars, and sent it to the bank. The bank entered judgment upon it in Clarion county, and at once issued a writ of fieri facias upon it and levied upon the goods of O'Neil. The learned judge of the court below held this to be a legal fraud, and the judgment in this action was entered against the bank upon the theory that the money raised by the sheriff's sale upon this judgment was subject to attachment by other creditors of O'Neil, as his money in the hands of the bank. This is made to appear by the answers to the points submitted by the defendant. Its second point asked an instruction that "A judgment confessed by an insolvent man to secure a bona fide creditor, whether contingent or otherwise, even though it be intended to and has the effect of giving him a preference over other creditors, is not fraudulent in law or in fact." This was answered "refused." We think the answer should have been, substantially, "Such a confession of judgment is not a fraud in law. Whether it is a fraud in fact or not must depend on the attending circumstances." The answer made by the learned judge must have rested on one of two reasons: either he regarded the preference resulting from the confession of the judgment a fraud upon other creditors, or that the making of the note large enough to cover, as the debtor supposed and intended, his indorsements as well as his own notes, was a fraud in law, and rendered the note void for all purposes. Something like the first of these positions was held in *Ashmead v. Hean*, 13 Pa. St. 583. An insolvent debtor made a convey-



ance of real estate to a bona fide creditor, and for full value. The conveyance was held void because both parties knew that its effect must be to give the vendee the preference, and so to delay other creditors, and this was the purpose of the vendee in insisting on the conveyance. But this case was promptly overruled in *Uhler v. Maulfair*, 23 Pa. St. 481, where the proposition was distinctly stated that "So long as a debtor is the owner of real estate, he may prefer one creditor to another, either by judgment or by conveyance for a fair price." And why not? If the debtor does not convey or encumber his real estate, the law will. <sup>467</sup> The most vigilant creditor will secure the first lien, although it is clear that others may be hindered and delayed or wholly defeated in consequence. If instead of obtaining his judgment through an action at law the creditor is able to secure a confession of judgment by his debtor, the result is precisely the same. In either case his purpose is to secure himself first, if that is possible, regardless of the effect that may follow as to others who are behind him. Since *Uhler v. Maulfair*, 23 Pa. St. 481, this has been the settled law of this state: *Wilson v. Berg*, 88 Pa. St. 167; *Lake Shore Bank. Co. v. Fuller*, 110 Pa. St. 156; *Werner v. Zierfuss*, 162 Pa. St. 360.

The other question remains: Was the note rendered invalid by the circumstance that it was made large enough to cover, or nearly so, the contingent liabilities of O'Neil to the bank, growing out of his indorsements? It is not alleged that the giving of the note was the result of a conference between the parties. It was the act of O'Neil done in view of his financial condition at the time. There is no reason for imputing to him, therefore, a fraudulent motive in making the note, nor for imputing such motive to the officers of the bank in accepting and using it. The question is, Did the fact that the amount inserted in the note was intended to be large enough to cover both his actual and his contingent liabilities to the bank render it void in toto? In questions of distribution of assigned estates it often becomes necessary to inquire when the right of action in a claimant vested, or when his debt became an absolute indebtedness of the assignor or insolvent, but that question does not arise here. The question comes down to this: Can a debtor secure his friend against a contingent liability? We answer this question in the affirmative. This has been held as to bail: *Davis v. Charles*, 8 Pa. St. 82. I am not aware that the question has arisen upon just the circumstances presented in this case, but the general proposition that an indorser is contingently liable to the holder

of the note, and that he may secure the holder by the delivery of collaterals or by a confession of judgment, is recognized in many cases. The holder is not entitled to collect his debt from the indorser who is primarily liable to him, and then collect it over again from the maker. The payment by either extinguishes the debt. If the maker pays, the indorser's liability to the bank is correspondingly reduced, and the judgment so far satisfied.

408 The court below also held that an agreement between a portion of the creditors of O'Neil by which it was agreed to buy at the sheriff's sale so much of the logs and other property of O'Neil as was practicable, manufacture the logs into boards, sell for the best price they could get and divide the net proceeds of such sales, was fraudulent. This combination only embraced a portion of the creditors. It did not look to preventing competition at the sale or to depressing the price. It was an attempt to make the goods, if bought by any member of the combination, bring the most money possible to apply upon their debts, by adding to the value of the logs the profit of their manufacture into boards. This was not necessarily fraudulent: *Young v. Snyder*, 3 Grant Cas. 151. There must be actual fraud, such as a combination to purchase at an undervaluation, or to discourage bidding by others, to justify setting aside the sale or treating it as a nullity: *Dick v. Cooper*, 24 Pa. St. 217; 64 Am. Dec. 652. The cases cited in support of the judgment of the court below are not in point. *Oyster v. Short*, 177 Pa. St. 601, was the case of an assigned estate, and the question raised was one of distribution between claimants on the fund in the hands of the assignee. *Brough's Estate*, 71 Pa. St. 460, also arose on the distribution of an insolvent estate. The question in both cases was, At what time the right of certain claimants to share in the fund matured? These cases throw no light upon the questions raised here.

On a consideration of the several assignments of error, we sustain the second, third, and fourth. We incline also to sustain the first, as we see no evidence in the case that should justify the jury in finding fraud in fact, and as the circumstances did not amount to fraud in law. There was therefore really nothing to submit to the jury upon this question.

The judgment is reversed and a venire de novo awarded.

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**DEBTOR AND CREDITOR—PREFERENCES—CONFESSION OF JUDGMENT.**—One who is in debt to different persons may give a preference to any one of them, by confessing a judgment in his favor. The fact of the other indebtedness weighs nothing against

the validity of such preference: *Kitchen v. McCloskey*, 150 Pa. St. 376; 30 Am. St. Rep. 811. Where a number of notes are made by one person to another, judgments confessed thereon, and executions issued on the same day, these are badges of fraud as against other creditors; but the transaction is not fraudulent if done fairly and in good faith, to secure an honest debt, though also designed to give a preference: *Floyd v. Goodwin*, 8 Yerg. 484; 29 Am. Dec. 130. See *Cureton v. Doby*, 10 Rich. Eq. 411; 73 Am. Dec. 96; *White v. Trotter*, 14 Smedes & M. 30; 53 Am. Dec. 112.

**JUDICIAL SALES — VALIDITY — COMBINATION OF BIDDERS.**—An agreement to make a joint bid at a judicial sale, although it may indirectly have the effect of keeping others from bidding, is not illegal unless it is intended to avoid competition: *Gulick v. Webb*, 41 Neb. 706; 43 Am. St. Rep. 720, and *note*. See *Barton v. Benson*, 126 Pa. St. 431; 12 Am. St. Rep. 883.

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## BYERS v. BYERS.

[183 PENNSYLVANIA STATE, 509.]

**PARTITION BY PAROL** made between cotenants is **valid and conclusive** whether made horizontally or vertically.

**PARTITION BY PAROL—BURDEN OF PROOF.**—If cotenants have made a parol partition of coal lands and one of them afterward claims that such partition includes both the surface and the coal, while the other claims that it includes only the surface of the land, the presumption is that such partition includes both the surface and the coal, and the burden of proof is upon the latter to show to the contrary.

**PARTITION BY PAROL—PRESUMPTION.**—A parol partition of coal lands between cotenants raises the presumption that such partition included the whole estate, both the surface and the coal, and the subsequent occasional taking of coal, even if only permissive, by a cotenant, who claims that such partition extended only to the surface, does not prevent the partition from being executed in a legal sense, including the coal as well as the surface of the estate. The burden of proof is still upon him to prove his claim.

**PARTITION BY PAROL—PART PERFORMANCE.**—The execution of a parol partition requires such acts of the parties upon the land as show a part performance of the agreement sufficient to bring it within the equity of enforcement.

J. B. Head and J. S. Moorhead, for the appellant.

D. S. Atkinson, J. M. Peoples, and W. S. Byers, for the appellee.

**515 MITCHELL, J.** The parties derived title in common, under the will of their father, in 1835. In 1895 appellant brought this action for partition of the coal only, thereby admitting that the surface of the land was held in severalty; the appellee defended on a parol partition claimed to have been made in 1848. Both parties therefore agreed that there was a partition, and as it was admitted that there had never been any



deed between them, the partition necessarily rested in parol. Appellant, however, claimed that what was done in 1848 was a temporary division of the surface for convenience of working only, which did not include the coal, and which was incomplete, but ripened into title in severalty <sup>516</sup> as to the surface by the long-continued separate possession of the purparts taken under it. Appellee, on the other hand, contended that it was a complete and executed partition from its date, and included the coal as well as the surface. The difference as to how the partition of the surface became effective, whether by virtue of the agreement itself or only by the subsequent several possession, is not material, and the only substantial question in controversy was what the partition included, the whole land, or the surface only. The learned judge below charged the jury that there could be no parol severance of the estate in the coal from the estate in the surface, and therefore if they found there had been a partition at all, it was a partition of the whole, or, to use his very graphic expression, if the jury found that there was a parol partition, "the cleaver of the law severed the ownership from the surface clear down to the center of the earth." This was practically a direction to find for the defendant, and all the assignments of error, though taken to different parts of the charge, and in varied phrase, are based upon this ruling of the court. We are of opinion that it was error. It was settled as early as *Ebert v. Wood*, 1 Binn. 216, 2 Am. Dec. 436, that a parol partition between tenants in common is valid and conclusive. Chief Justice Tilghman puts the decision mainly on the ground of part performance, which the English courts of equity had held to take such contracts out of the bar of the statute of frauds. But another and equally weighty reason might be added from the nature of tenancy in common. As each tenant has not only title, but joint and several possession of the whole and of every part, the change to a title in severalty in any specified part is not such a transfer of title to land as is within the mischief contemplated by the statute of frauds. This reason was indicated in *Mellon v. Reed*, 114 Pa. St. 647, and again more fully in *McKnight v. Bell*, 135 Pa. St. 358, where it is said by our late brother Clark, "A partition which merely severs the relation existing between tenants in common in the undivided whole and vests title to a correspondent part in severalty is not such a sale or transfer of title as will be affected by the statute of frauds. The reason of this rule rests in this: that the partition is not an acquisition or purchase of land, nor is it

in any proper sense a transfer of the title to land; it is a mere setting apart in severalty of the same interest held in common, <sup>517</sup> not in other, but in the same lands." The cases have drawn the line between a mere parol agreement to part, and an agreement followed by acts of the parties on the land itself, indicating several possession taken in execution of the agreement. The former is inoperative, but the latter is valid.

The right of partition by the parties is an incident of ownership, and, like the right of an owner in severalty to a lien, is only limited by such restraints as the law has put upon it in regard to personal capacity and mode of conveyance. The statute of frauds requires ordinary conveyances of land to be in writing, but, as we have already seen, the statute does not apply to executed partitions between tenants in common. They are therefore free, and as they rest solely on the agreements and intentions of the owners, we see no room for distinctions in regard to the methods of partition, whether by vertical or by horizontal lines. There is no difference in the right, nor in any other respect except in facility of proof of the intent, inasmuch as the ordinary mode is by vertical lines, and therefore such partition is more readily presumed, and acts done in pursuance of it on the surface are more easily shown. Horizontal divisions of land as such are comparatively rare, but they are well established, and may be made in the same way and subject to the same rules as any other mode, if the parties so agree. Their modern development, especially in this state, may well account for the absence of cases in our reports, but the principles on which such questions are to be decided do not admit of doubt. They are illustrated by the case of *Caldwell v. Copeland*, 37 Pa. St. 427, 78 Am. Dec. 436, where, although the court is treating of a conveyance by deed, it said, "There is no more reason why mines in another's land, whether opened or unopened, may not be held by a deed, . . . than why land in its most ordinary signification may not be so held. In other words, mines are land, and subject to the same laws of possession and conveyance." And the analogous right of severance of the strata of land horizontally by the individual owner by acts as well as by deed is established in *Delaware etc. Canal Co. v. Hughes*, 183 Pa. St. 66, ante, p. 743, opinion filed since this case was argued.

There was no objection to the plaintiff proving, if he could, that the partition was limited to the surface, and that the coal was left in common. The parties might make partition of all <sup>518</sup> their land or of any part of it, and in any manner they chose

to agree upon. In *Coleman v. Coleman*, 19 Pa. St. 100, 57 Am. Dec. 641, the parties made partition of their land in 1787, excepting out of it the Cornwall ore banks, which they agreed should remain in common. This court held not only that the partition was valid, but that the retention of the ore banks in common was part of the consideration for the purparts in severalty, and therefore could not be subject to a new partition.

The ordinary mode of partition being of the whole land by vertical lines, and it being admitted that a partition had been made, the burden was upon the plaintiff to show that it was limited to the surface. In plaintiff's sixth point he asked the court to say that his continuing to take coal after the partition, even if only permissive, showed that there never was a fully executed partition of the coal, and plaintiff therefore must recover on his written title. This point, however, could not have been affirmed. The execution of a parol partition which is required by the cases means such acts of the parties upon the land as show a part performance of the agreement, sufficient, as suggested by Chief Justice Tilghman, *supra*, to bring it within the equity of enforcement. The presumption from the conceded fact of partition was that it included the coal as well as the surface, that being the usual method. On the question whether it did or not, the plaintiff was entitled to go to the jury, but he had the burden of proof. An occasional use, such as was shown here, if the jury should find it to be permissive only, and not in the exercise of a right, would not prevent the partition from being executed in the legal sense, and including the coal as well as the surface. It was evidence of a claim of right, but not conclusive either of such right or of the failure to execute the partition.

The will of John Boyer had no bearing on the case except as showing that he had in his mind the timber, coal, and limestone on the tract as distinct elements to be considered in the equal division which he directed. But his devise was of the fee in common, and his devisees could divide in any way they pleased.

Nor had the statute of limitations any bearing on the case. The plaintiff clearly never had any possession of the coal which was either adverse or exclusive, and the surface, as already said, was admitted by both parties to be held in severalty. There was 519 no dispute as to the parol partition, and the only contested issue was what it included. The jury should have been instructed that the parties had the right to make such partition as they chose, either of the whole land or of the surface only, that the



presumption was that they parted the whole, but that presumption would give way to the intention of the parties, and it was for the jury to determine from all the evidence what the parties intended to include in the partition, and to find a verdict that would carry out that intention.

Judgment reversed and venire de novo awarded.

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**PARTITION—PAROL, BETWEEN COTENANTS.**—A parol partition of lands is valid: *Murrell v. Mandelbaum*, 85 Tex. 22; 34 Am. St. Rep. 777. Such partition could be made at common law between parceners and tenants in common: Monographic note to *Tomlin v. Hilyard*, 92 Am. Dec. 121, on parol partition. A parol partition made between tenants in common by marking a line of division on the ground, and followed by a corresponding separate possession, is good, and not within the statute of frauds: *Brown v. Wheeler*, 17 Conn. 345; 44 Am. Dec. 550; *Wood v. Fleet*, 36 N. Y. 499; 93 Am. Dec. 528, and note; note to *Aycock v. Kimbrough*, 10 Am. St. Rep. 748, 749; but the equitable title only passes, which by adverse possession may ripen into a legal title: *Nave v. Smith*, 95 Mo. 596; 6 Am. St. Rep. 79, and note. See *Sutton v. Porter*, 119 Mo. 100; 41 Am. St. Rep. 645.

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## PEPPERDAY v. CITIZENS' NATIONAL BANK.

[183 PENNSYLVANIA STATE, 519.]

**BANKS AND BANKING—PRINCIPAL AND AGENT.**—If a national bank voluntarily acts as agent for its depositor in the sale of his stock or securities, and accepts a check in payment instead of cash, without authority from him, and credits his account with the amount of the check, it is liable to him therefor, although such check afterward proves worthless, and the bank exercises due diligence in attempting to collect it.

**BANKS AND BANKING—PRINCIPAL AND AGENT—VOLUNTARY PAYMENT.**—If a bank acts as agent for its depositor in a sale of his securities and accepts a check instead of cash in payment, without authority from him, notifying him of the deposit of such check to his credit, and afterward paying his check for the amount so received, such payment is voluntary and cannot be recalled by the bank, although the check received by it subsequently proves to be worthless, and it uses due diligence in attempting to collect it.

P. H. Gaither, G. H. Albert, A. H. Bell, and C. E. Woods, for the appellant.

J. B. Head and J. S. Moorhead, for the appellee.

<sup>521</sup> GREEN, J. If the plaintiff had been the owner of the check in question, and had deposited it with the defendant bank for collection, it may be conceded that the bank would not have been liable for nonpayment of the check. While the course and the process <sup>522</sup> of collection were rather slow, it was still within

the limits of ordinary bank usage, and we think a charge of negligence could not have been established. But the trouble with the case is that there were no such facts in it. The plaintiff was not the owner of the check, and he did not deposit it for collection. The check was drawn to the order of the defendant and was therefore the property of the defendant. It might do with it as it chose. The liability of the defendant to the plaintiff was not a liability on the check, or for any use the defendant did make or could make of it. The check was the exclusive property of the defendant; the plaintiff had no interest in it whatever. In order that the plaintiff might become its owner, it would have been necessary for the defendant to indorse it, so as to make it payable to the plaintiff's order. Even if the plaintiff had received the physical custody of the check by delivery of its corpus to him, he could not have deposited it in the defendant's bank for collection without the indorsement of it by the defendant to his order, or in blank. But there were no facts of that character in the case. The bank never delivered the check to the plaintiff, nor did it deposit the check to the credit of the plaintiff's account. It assumed it itself, and of course assumed the collection of it. The plaintiff, as a matter of fact, had nothing whatever to do with the check. He had no right, title, or interest in it, and he was never placed in such a position by the bank that he could possibly have exercised any claim of dominion or ownership or interest of any kind in it. Moreover, the defendant still has the check. It has never delivered or tendered it to the plaintiff, and hence if it had received the check from the plaintiff in regular course it would have been liable. In *Fifth Nat. Bank v. Ashworth*, 123 Pa. St. 212, Mr. Justice Paxson, delivering the opinion, said: "It is safe to say, as a general rule, that when a bank receives a check from one of its depositors for collection, it must return him the check or the money."

The present action is brought by the plaintiff, as a depositor in the defendant bank, to recover the amount of his deposit, five hundred and sixteen dollars and eighty-six cents, standing to his credit on the books of the bank, after the refusal of the bank to pay his check for that amount on December 27, 1895. The defendant company refuses to pay the money because it says that, owing to a transaction which it <sup>523</sup> had with the plaintiff, it had received from the plaintiff fifty-one shares of the capital stock of the Pennsylvania Railroad Company, to be sold for his account and upon his direction. That it had sent

the certificates of stock to a firm of brokers, L. H. Taylor & Co., in Philadelphia, where they remained until, on December 17, 1895, the plaintiff directed the defendant to sell twenty shares of the stock at the best market price on December 18th or 19th. This order was communicated to the brokers by the bank, and on December 18th the brokers reported that they had sold the stock. On December 20th the defendant received from the brokers their check on a Philadelphia bank, payable to the order of the defendant bank, for one thousand and seventy-three dollars and seventy-five cents. It then credited the plaintiff's account on its books, and sent the check with other checks to Second National Bank of Pittsburg, for collection, for the account of the defendant bank. On December 24th it received a telegram, which announced the assignment of Taylor & Co. of Philadelphia, and on December 27th the check came back protested. It charged back on the plaintiff's account the amount of the check and protest, and thus reduced the amount of his credit so that his account was overdrawn. It claims that it was relieved of liability for the loss on the Taylor check, and might lawfully charge the plaintiff's account with this loss. The question at once arises, What was the true legal relation between the plaintiff and defendant as to this particular transaction? It is perfectly clear that it is not a relation of depositor with the bank. The plaintiff never having had the check, never deposited it with the defendant. It is true the defendant credited the plaintiff's account with the amount of the check when it received it. It thus made itself debtor to him for the amount credited. This it had a perfect right to do, and the plaintiff had a perfect right to accept the credit and draw against it. When the bank gave the credit to the plaintiff, it of course assumed that the check would be paid, as it had a right to do, but does it follow that when the check was dishonored several days later, on presentation, the defendant had a lawful right to charge back the loss to the plaintiff's account? As has already been said, if the check had belonged to the plaintiff and had been deposited by him, the bank would probably not have been chargeable with the commercial negligence which imposes liability on that ground upon such institutions. <sup>524</sup> But is it perfectly clear that such was not the legal relation of the plaintiff and defendant, and hence the rule which would or might have exempted the bank from liability as a consequence of such a relation has no application, and cannot be invoked by the bank. What, then, was their true legal relation? The bank voluntarily



undertook to sell the plaintiff's stock at his request. But in so doing it was not exercising any function which pertained to it as a bank. It is no part of the business of a national bank to engage in the selling of stocks for anybody. It was a transaction outside of its regular banking business, and not within its chartered powers. This being so, when the bank received the stock from the plaintiff, and agreed to sell it, it could only be understood to assume the relation of agent for the plaintiff as principal, in that particular transaction. When it sold the stock it was acting as his agent, and became subject to whatever rules of law are applicable to that relation. Of course, acting in that capacity, it could sell as any other agent, and would be responsible for its acts as any other agent.

In the case of *Fifth Nat. Bank v. Ashworth*, 123 Pa. St. 212, above referred to, the transaction in question was in the line of ordinary banking business, yet the defendant bank was held liable, simply because, in collecting its customer's check, it took a cashier's check for the check deposited instead of taking cash. The action was by a depositor against a bank with which he had deposited a check for two thousand six hundred and twenty-two dollars and twenty-five cents on the Penn bank. The check was presented next day through the clearing-house, but the Penn bank had then closed its doors and the check was protested. A few days later the Penn bank resumed operations, and was open, and doing business on the day following. On that day the check was again presented, together with some other checks, by the defendant bank, and in exchange for them all a cashier's check of the Penn bank was given to, and received by, the defendant bank. The Penn bank was paying all checks presented. The cashier's check was deposited by the defendant bank with another bank through which it cleared, but on the next business day, which was Monday following the Saturday on which the cashier's check was given, the Penn bank again closed its doors, and the cashier's check was not paid. On these facts we held the defendant bank responsible to the plaintiff for the loss. Paxson, J., further said: "It is equally clear that if the collecting bank <sup>525</sup> surrenders the check to the bank upon which it is drawn, and accepts a cashier's check, or other obligation in lieu thereof, its liability to its depositor is fixed, as much so as if it had received the cash. It has no right, unless specially authorized to do so, to accept anything in lieu of money: Citing *Merchants' Nat. Bank v. Goodman*, 109 Pa. St. 422, 58 Am. Rep. 728, and several other cases. We need not discuss the

question whether the defendant failed to exercise due diligence in not sending the dishonored check through the clearing-house on Saturday. That it could have been done, and was done by some other parties, distinctly appears by the evidence, and is not disputed. We think the defendant bank fixed its liability by surrendering the check to the Penn bank and accepting the cashier's or teller's check of that bank. As between the defendant and its depositor, this amounted to payment. The plaintiff has neither his check nor his money." With how much more force do these remarks apply to the present case. Here the defendant accepted the check of Taylor & Co. in payment for the stock, when it had no legal right to accept anything but money. It credited the plaintiff's account with the amount of the check, and thereby assumed it to be that much cash. It might have notified the plaintiff that it had received the check, and delivered it to him, or held it for collection before crediting his account. If he had accepted it as cash the bank would have been exonerated, or if he had agreed it might hold it for collection before giving him credit, and had used due diligence in its collection, it probably could not have been held liable. But neither of these things was done; on the contrary, it assumed it as cash and so treated it in its dealing with the plaintiff. We do not see how it can be relieved from responsibility. In the case of *Merchants' Nat. Bank v. Goodman*, 109 Pa. St. 422, 58 Am. Rep. 728, we held that a bank which had received for collection from a depositor a check on another bank, and had sent the check to the bank on which it was drawn, and had received from that bank a draft on some other bank which was not paid, was liable to its depositor for the check he had deposited. It was claimed that there was no negligence, because the usual course of business was followed. But we held this was not sufficient. The court below said, and we affirmed it: "The defendant assumed the responsibility of sending the evidence of the plaintiff's right to have the money for which it called collected for <sup>526</sup> their benefit, to the bank which was expected to make payment. Not obtaining the money, but a worthless draft, in return, the defendant, treating the check as not paid, charged the amount of it back to the plaintiff's account, and when they called for the check, as the best evidence of their right to recover against the maker, they are informed, 'The check you call for cannot be returned; it was paid, charged to the drawer's account, and canceled.'" We held the same doctrine in *Hazlett v. Commercial Nat. Bank*, 132 Pa. St. 118.

That an agent for sale has no power to receive anything but money in payment is too familiar a rule to require the citation of authorities to support it. A single reference to one of our most recent decisions, where the subject is reviewed, will suffice: *Paul v. Grimm*, 165 Pa. St. 139; 44 Am. St. Rep. 648.

We cannot see how this case can be decided upon the question whether the bank used due diligence in collecting the check of Taylor & Co. It never was the property of the plaintiff. He did not deposit it, and had nothing to do with it. The defendant received it, owned it, held it, still holds it, and never even tendered it to the plaintiff. The bank treated it as cash on its own responsibility, and credited the plaintiff's account with the amount of it. We know of no principle upon which it can charge back to him a check which he never saw, never owned, never had any interest in, and upon which his name never did and does not now appear, either as drawer, payee, indorser, or in any other manner whatever. The assignments of error are dismissed.

It is perfectly manifest that if the bank had paid to the plaintiff in bank notes the amount of the check, and he had put them in his pocket and gone about his business, the bank could never have recovered back the money. It could pay him the money if it chose, and he could receive it in good conscience. That being so, he could keep it, and could not be compelled to repay it. The law upon that subject is without question. The payment would be voluntary on the part of the bank, and being such, the plaintiff could conscientiously receive it, and he could thereafter retain it. Now, it so happens that the actual facts make out just such a case. When the bank received the check and credited the plaintiff's account, it gave him notice to that effect, and thereupon he drew a check for sixteen hundred dollars against his <sup>527</sup> account, which included the whole amount of the sum credited, and six hundred dollars besides, and when the check was presented the bank paid it. It was not until after this that it charged back the credit against the account. This, it is very clear, it could not do without his consent.

Judgment affirmed.

MITCHELL, J., dissenting. As to the stock, the bank was a mere agent for transmission and sale, not responsible for anything but negligence, of which there is no evidence. This is conceded. In the ordinary course of business the bank received the check for the proceeds of the sale of stock, and of course its



title to the check was only as agent for the real owner, the plaintiff. Treating the check as money, also in the ordinary course of its business, the bank passed the amount to the credit of the plaintiff in his account. It is said in the opinion of the court that it is clear that as to the check the relation of depositor did not exist. But with great respect for my brethren who so hold, I think it perfectly clear that that was the exact relation. The bank treated the check as money of its depositor, credited it in his deposit account, so notified him, and he ratified and assented to its action by drawing against the sum. It is the basis of the alleged balance of deposit in his favor, for which this suit is brought. Without that check as part of his deposit account he has no such balance; his account is overdrawn. When the check came back unpaid the bank charged it up against its depositor to offset the formal credit which had been given him for it. This it had the right to do, just as if it had credited him with a deposit of one thousand dollars in bank notes or gold coin which later were found to be counterfeit.

It is also said that the bank still has the check, and has not delivered it to plaintiff. He refused it. When he was notified that it had come back, he said peremptorily he had nothing to do with it. In this he was wrong. It was the basis of a credit to which he was not entitled, and on which he should not be permitted to recover.

Williams and Fell, JJ., join in this dissent.

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**BANKS AS AGENTS—LIABILITIES.**—A very important part of the business of every bank, whether private or incorporated, consists of acting as an agent or bailee for its customers, and it argues much for the skill and fidelity with which this business has usually been transacted, that it has not yet given rise to sufficient litigation to fully settle the law upon the subject, and to determine beyond further controversy the measure of care due from banks and their officers and agents, and the extent of the liability of the banks for the negligence or want of fidelity of such officers or agents: Monographic note to *Isham v. Post*, 38 Am. St. Rep. 773, on the care required of bankers acting as agents or bailees.

## ESTATE OF STULL.

[183 PENNSYLVANIA STATE, 625.]

**MARRIAGE AND DIVORCE—PROHIBITED MARRIAGES—CONFLICT OF LAWS.**—If, under a statute providing that a wife or husband who shall have been guilty of adultery, shall not marry the person with whom it was committed during the life of the former husband or wife, a husband, after being divorced from his wife, in the state where such statute is in force on the ground of adultery with a woman domiciled therein, goes into another state and marries his paramour, such marriage being there valid, and they immediately return to their former domicile, the second marriage is void in the state having the prohibition, and the second wife is not entitled to administer upon the husband's estate while the first wife survives.

**MARRIAGE AND DIVORCE—PROHIBITED MARRIAGES—CONFLICT OF LAWS.**—If a man and woman, citizens of the same state, and subject to an absolute statutory prohibition against entering into a marriage contract which is against good morals, leave their domicile and enter another state where marriage between them is not prohibited, and there marry for the express purpose of evading the law of their domicile, such marriage is void in the state having the prohibition.

**MARRIAGE AND DIVORCE—PROHIBITED MARRIAGES—CONFLICT OF LAWS.**—Persons domiciled in one state, where marriage between them is absolutely prohibited, cannot evade its laws and policy by going to another state, and there marrying, and then returning to the home state to reside. Such marriage is void in the latter state.

R. W. Irwin, for the appellant.

B. Crumrine and E. E. Crumrine, for the appellee.

**628 GREEN, J.** The question at issue in this case arises upon the application of a woman, claiming to have been the lawful wife of the decedent at the time of his death, to have letters of administration upon his estate granted to her. The letters were refused by the register and orphans' court, on the ground that the petitioner was not the lawful wife of the decedent, and hence was not entitled to them. Briefly, the facts were that the decedent, Richard H. Stull, was married to Hannah M. Lewis, who still survives. In February, 1894, the wife obtained a decree of absolute divorce from him on the ground that he had committed adultery with one Ada Widdup. On April 5, 1894, the decedent and the said Ada Widdup, both being citizens and inhabitants of Pennsylvania, went to Cumberland, in the state of Maryland, and were there united in marriage. They at once returned to Pennsylvania and there lived and cohabited as man and wife on the farm of the decedent in Washington county, until his death, on June 11, 1895. They had no children, but there was one child, a son, Samuel A. Stull, by the first marriage.

It was admitted and found in the court below, and is now conceded on the argument in this court, that the decedent and Ada Widdup, his paramour, with whom he had committed adultery, went into Maryland to be there married, for the express purpose of evading the law of Pennsylvania, which prohibits a marriage with the paramour during the life of the injured wife or husband. It is also conceded that by the law of Maryland there is no such prohibition, and that under that law the marriage was lawful. <sup>629</sup> The question arising is, Was the applicant the lawful wife of the decedent at the time of his death? She subsequently married one Morehouse, and now bears his name. Our act of March 13, 1815 (Purdon's Digest, 688, pl. 29, sec. 9), provides as follows: "The wife or husband who shall have been guilty of the crime of adultery shall not marry the person with whom the said crime was committed, during the life of the former wife or husband; but nothing herein contained shall be construed to extend to or affect, or render illegitimate, any of the children born of the body of the wife during coverture." Section 10 disables a guilty wife who after the divorce cohabits with her paramour from alienating any of her lands and tenements, and avoids such conveyances if made.

By the ninth section it will be perceived there is an absolute prohibition of any subsequent marriage between the guilty person and the paramour during the life of the former wife or husband. It forbids the marriage relation to be contracted in the most general terms. The guilty party "shall not marry the person with whom the said crime was committed." A personal incapacity to marry is imposed. The necessary meaning of this language is that they shall not marry at all, in any circumstances, or at any time, or any place, so long as the injured party is living. So far as the purpose and meaning of this statute are concerned it is of no consequence where such subsequent prohibited marriage takes place. The relation itself is absolutely prohibited, and hence is within the operative words of the statute, without any reference as to where the marriage occurs.

It is now necessary to notice the other environments which affect the case. Both the parties to the prohibited marriage were citizens of Pennsylvania, domiciled on her territory, both before and after the marriage, and were only absent long enough to have the ceremony performed. They continued to reside together in Pennsylvania until the death of the husband. The woman resides here still. She never acquired any rights as an inhabitant of the state of Maryland, and can and does not now claim any right of that character. She is now claiming, not



only the protection of our law, but a special privilege and right, accorded only to lawful wives under the intestate law of Pennsylvania, to wit, the right to have administration of the estate <sup>630</sup> of her alleged husband. In this respect the case is different from many of the cases cited in the paper books, and the difference is against her claim. Here, she, being now and at all times a citizen of Pennsylvania, subject at all times to its laws and its policies, having committed a direct and positive violation of one of those laws which relates to, and immediately affects, the very application she now makes, solicits a decree from an orphans' court of Pennsylvania, giving her property rights and a right of administration, on the specific ground that she acquired those rights, if she acquired them at all, in consequence of a violation of the law of Pennsylvania. And she asks this decree, as she only can ask it, by the importation and actual enforcement of the law of a foreign state, within our own territory, and in our own judicature, when that law is contrary to the express terms of our own law and contrary to the manifest and settled policy of our commonwealth. Moreover, it is expressly conceded that the parties left the territory of Pennsylvania and entered that of Maryland for the very purpose of evading the law of Pennsylvania which prohibited their marriage. We do not think that any of the cases cited for the appellant contains so many elements of invalidity as this.

There is no question as to the general rule that a marriage which is valid by the law of the place where it is solemnized is valid everywhere. Of course, even this general rule has its exceptions where the particular marriage is contrary to good morals or public policy, or to the positive statutes of the country where it is sought to be enforced. But where a man and woman, citizens of the same state, and subject to an absolute statutory prohibition against entering into a marriage contract which is against good morals and contrary to public policy, leave their domicile and enter another for the express purpose of violating the law of their domicile in this respect, the case is highly exceptional, and the great weight of authority is against the validity of such a marriage in the place of their domicile. There have been conflicting decisions upon the question, but very few of them sustain the validity of the relation where it has been assumed for an intended evasion of the law of the domicile and is contrary to good morals. The fact of such an intended evasion has been repeatedly recognized as the basis of invalidity, when otherwise validity would have been declared. Thus, in a noted

<sup>631</sup> case in Tennessee (*Pennegar v. State*, 87 Tenn. 244, 10 Am. St. Rep. 648), decided in 1889, where the same question precisely as in this case was raised, to wit, a marriage in Alabama between a man and woman domiciled in Tennessee, who had been guilty of adultery, and, after a divorce had been obtained in Tennessee on that ground, the guilty husband and his paramour went to Alabama and were married, and at once returned to Tennessee. They were indicted in Tennessee for lewdness, and were convicted and sentenced, and appealed to the supreme court, claiming that the marriage being lawful in Alabama must be held lawful in Tennessee. In the latter state the statute prohibited such marriages in almost the words of our own act of 1815, to wit: "When a marriage is absolutely annulled the parties shall be severally at liberty to marry again; but a defendant who has been guilty of adultery shall not marry the person with whom the crime was committed, during the life of the former husband or wife." In an elaborate opinion the supreme court sustained the sentence and held the Alabama marriage to be void in Tennessee. In view of the close analogy of the case to the one we are considering, some citations from the opinion will be appropriate. "The marriage being prohibited by statute is void if solemnized in this state. . . . Does the rule that a marriage valid where solemnized is valid everywhere make the second marriage in Alabama in this case valid? . . . Marriage is an institution recognized and governed to a large degree by international law prevailing in all countries, and constituting an essential element in all earthly society. The well-being of society, as it concerns the relation of the sexes, the legitimacy of offspring, and the disposition of property alike demands that one state or nation shall recognize the validity of marriages had in other states or nations according to the laws of the latter, unless some positive statute or pronounced public policy of the particular state demands otherwise." The opinion further holds that the rule that a marriage valid where solemnized is valid everywhere has its exceptions, to wit: "1. Marriages which are deemed contrary to the law of nature as generally recognized in christian countries; 2. Marriages which the local lawmaking power has declared shall not be allowed any validity, either in express terms or by necessary implication. . . . This (second) class may be subdivided into two classes: (a) Where <sup>632</sup> the statutory prohibition relates to form of ceremony and qualification, it is held that compliance with the law of the place of marriage is sufficient, and its validity will be recognized, not

only in other states generally, but in the state of domicile of the parties, even where they have left their own state to marry elsewhere for the purpose of avoiding the laws of their domicile; (b) Cases which, prohibited by statute, may or may not embody distinctive state policy as affecting the morals or good order of society. . . . Each state or nation has ultimately to determine for itself what statutory inhibitions are by it intended to be imperative, as indicative of the decided policy of the state concerning the morals and good order of society to that degree which will render it proper to disregard the *jus gentium* of 'valid where solemnized, valid everywhere.' . . . If, as we have seen, the statutory inhibition relates to matters of form, of ceremony, and in some respects to qualification of the parties, the courts would hold such valid here; but if the statutory prohibition is expressive of a decided state policy as a matter of morals, the courts must adjudge the marriage void here as *contra bonos mores*. . . . Now, believing, as we do, that the statute in question, which we are called upon to construe in the case at bar, is expressive of a decided state policy not to permit the sensibilities of the injured and innocent husband or wife, who has been driven by the adultery of his or her consort to the necessity of obtaining a divorce, to be wounded, or the public decency to be affronted, by being forced to witness the continued cohabitation of the adulterous pair, even under the guise of a subsequent marriage performed in another state for the purpose of evading our statute, and believing that the moral sense of the community is shocked and outraged by such an exhibition, we will not allow such parties to shield themselves behind a general rule of the law of marriage, the wisdom and perpetuity of which depends as much upon the judicious exceptions thereto as upon the inherent right of the rule itself."

The foregoing reasoning is satisfactory to us. It invokes practically three distinct ideas, to wit: 1. That a foreign marriage is contrary to the positive statute of the domicile; 2. That it is contrary to the public policy of the government of the domicile, in that it offends against the prevailing sense of good morals among the people there dwelling; and 3. It was contracted <sup>633</sup> for the express purpose of evading the positive law of the domicile, and it is therefore to be regarded as a fraud upon the government and people of the domiciliary residence. The combination of these three objections seems to be most fatal to the validity of the marriage thus contracted. The writer is disposed to regard each one of them as fatal. Instances of



invalidity from each source in other matters than foreign marriages are not at all uncommon, but it is not necessary to pursue them in the books, as it would involve unnecessary labor and space. There is abundant authority for their application in the marriage cases. Perhaps the most conspicuous case of the effect of mere statutory prohibition is the Sussex Peerage case, 11 Clark & F. 85, which prohibited any marriage of any descendant of King George II without the previous consent of the king. A marriage having been contracted at Rome between a son of George II and a lady who was a British subject, without the royal consent, a question arose as to the validity of this marriage, which was submitted to the judges of the house of lords. Chief Justice Tindal, delivering the opinion, said: "The statute in question does not enact an incapacity to contract marriage within one particular country and district or another, but to contract matrimony generally and in the abstract. It is an incapacity attaching to the person of A B which he carries with him wherever he goes. But as a marriage once duly contracted in any country will be a valid marriage all the world over, the incapacity to contract a marriage at Rome is as clearly within the prohibitory words of the statute as the incapacity to contract in England." The prohibitory words of the statute were general: "That no one of the persons herein described shall be capable of contracting matrimony." "Here again," said the Chief Justice, "the words employed are general or more properly universal, and cannot be satisfied in their plain, literal, ordinary meaning, unless they are held to extend to all marriages in whatever part of the world they may have been contracted or celebrated. . . . It is certain that an act of the legislature will bind the subjects of this realm, both within the kingdom and without, if such was its intention." Lord Campbell said: "I have no doubt that it is competent to the British legislature to pass a law making invalid the marriage of particular British subjects all over the world. . . . And I am clearly of opinion that the intention is sufficiently testified by the language which has been employed."

634 While the words used in this British statute related only to particular persons, they were specific in prohibiting any marriage between such persons, and for that reason it was held that the prohibition was general and applied to any marriage, no matter where it was contracted. The same principle applies, as we have heretofore indicated, to the prohibition in the case at bar. It applies to any marriage, no matter where it may be

celebrated, and as the parties were, and continued to be, citizens of Pennsylvania, it applied to them.

In *Brook v. Brook*, 9 H. L. Cas. 212, another celebrated English case, where a man had married his deceased wife's sister, contrary to a British statute, the parties having gone to Denmark for that purpose, where such marriages were lawful, Lord Chancellor Campbell said: "It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to the law of religion or immorality or any of its fundamental institutions." And again: "If a marriage is absolutely forbidden in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another state in which this marriage is not prohibited, to celebrate a marriage forbidden by their own state, and immediately returning to their own state to insist on their marriage being recognized as lawful."

Upon the foregoing authorities, there is no doubt as to what the law is in England on this subject. It seems to us that these decisions are founded upon impregnable reasoning which cannot be answered, and these decisions apply with the greatest possible force to the case in hand. For in those cases the statutes did not prohibit marriages involving immoral considerations, but here where the subsequent marriage is a sort of reward for the prior adulterous intercourse, and as the subsequent cohabitation is distinctly offensive to all good citizens, the conclusion of invalidity is immensely strengthened by considerations of the greatest force.

In North Carolina, in the case of *Williams v. Oates*, 5 Ired. 535, involving the same principle, and almost the <sup>635</sup> same facts a similar decision was reached as in *Pennegar v. State*, 87 Tenn. 244; 10 Am. St. Rep. 648. A husband and wife domiciled in North Carolina were divorced for the wife's adultery. Afterward the wife and a man, a third person, both also so domiciled, to evade the law of North Carolina which prohibited her from marrying again, went into South Carolina and were there married according to the law of that state, and immediately returned to North Carolina, where they lived together as man and wife until the husband died intestate. It was held that the second wife was not the lawful widow of the deceased, and was

not entitled to an interest in his estate, the law of the domicile controlling the relation.

In *Marshall v. Marshall*, 2 Hun, 238, decided in 1874, the facts were that the plaintiff, Marshall, in 1858, was divorced from his then wife on the ground of his adultery. The parties to the divorce were then domiciled in New York. In 1866 the husband and another woman, both then residing in New York, went to Philadelphia to be married there, intending to return immediately to New York. They were married in Philadelphia, the first wife still living, and returned to New York as intended. It was held that the second marriage was absolutely void on the ground that "if citizens leave their own country and contract a marriage abroad, such marriage being forbidden by the law of the country of their residence, but allowed by the country where it is contracted, and being celebrated with an intent to resume and followed by an actual resumption of their old residence, the validity of the contract is to be determined by the law of the domicile."

It is true that this case was afterward overruled in the case of *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505, decided in 1881, but as neither of these decisions is binding upon us, we much prefer the ruling in *Marshall v. Marshall*, 2 Hun, 238. It is also true that in *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131 (1819), a contrary decision was made in the case of a marriage between a mulatto and a white woman, which was solemnized in Rhode Island, where it was not unlawful; it was held valid in Massachusetts, where such marriages were prohibited, although the parties were domiciled in Massachusetts and immediately returned there. The marriage was not questioned because it was contrary to good morals, but only because it was contrary to the words of the Massachusetts <sup>636</sup> statute. The decision, however, expressly excepted the case of incestuous marriages or others that "would tend to outrage the principles and feelings of all civilized nations," and hence is of scarcely any weight in the present contention. It was followed with reluctance in *Putnam v. Putnam*, 8 Pick. 433, but it was held to be doubtful of application in *West Cambridge v. Lexington*, 1 Pick. 505, 11 Am. Dec. 231, if the husband had come into Massachusetts to claim any marital rights, "upon the ground that the marriage upon which he founded his claim was contracted in violation of the laws of this state, and that it was contrary to good policy, as well as detrimental to the public manners, that he should be allowed to enforce such claim."



It is proper to observe that the leading textwriters on the conflict of laws express the same conclusions as embodying the latest and best considered doctrine upon this subject. Thus, in Story's Conflict of Laws, section 86, it is said: "But we are not, therefore, to conclude that every marriage by and between British subjects in foreign countries will be held valid, because it is celebrated according to the laws of such countries. On the contrary, where the laws of England create a personal incapacity to contract marriage, that incapacity has in some cases been held to have a universal operation, so as to make a subsequent marriage in a foreign country a mere nullity when litigated in a British court: Story's Conflict of Laws, sec. 87. Indeed, the general principle adopted in England in regard to cases of this sort appears to be, that the *lex loci contractus* shall be permitted to prevail, unless where it works some manifest injustice, or is *contra bonos mores*, or is repugnant to the settled principles and policy of its own laws." In section 112, quoting from Lord Robertson, in Fergusson on Marriage and Divorce, 397 to 399, it is said: "But a party who is domiciled here cannot be permitted to import into this country a law peculiar to his own case which is in opposition to those great and important public laws which our legislature has held to be essentially connected with the best interests of society." In a foot note to section 116, the author quotes from 1 Burge's Commentaries on Colonial and Foreign Law, pages 188 to 191, as follows: "The law which prohibits persons related to each other in a certain degree from intermarrying, and declares their intermarriage to be null, imposes on them a personal incapacity quoad that act; and that incapacity must continue to affect them as long as they retain their <sup>637</sup> domicile in the country in which that law prevails. The resort to another country where there was no such prohibitory law, for the mere purpose of evading the law of their own country, and with the intention of returning thither when their marriage had taken place, cannot be considered a change of their former domicile, or the acquisition of a domicile in the country to which they had resorted. They must therefore be regarded as still subject to the personal incapacity imposed by the law of their real domicile."

In Wharton's Conflict of Laws, section 159, the writer says: "But, when persons domiciled in a state where these prohibitions are in force are married without the domicile, in violation of such prohibitions, in a state where there is no opposing

legislation, the parties visiting the latter state for this purpose, will the former state recognize the validity of the marriage? The first point for the court of such a state to determine on such an issue is whether the prohibition of such marriages is part of the distinctive policy of the state. If so, the court, acting on the reasoning already given, must hold that persons domiciled in such state cannot evade its laws by going to another state and then returning to live in the home state in a union that state condemns. And so it has been ruled on several occasions": *Kinney v. Commonwealth*, 30 Gratt. 858; 32 Am. Rep. 690; *Williams v. Oates*, 5 Ired. 538; *State v. Kennedy*, 76 N. C. 251; 22 Am. Rep. 683; *Scott v. State*, 39 Ga. 321; *Dupre v. Boulard*, 10 La. Ann. 411.

Upon the whole case we consider that the weight of authority is against the validity of the marriage we are now considering, and upon well-settled principles we are convinced that it should not be sustained.

The decree of the court below is affirmed and the appeal is dismissed at the cost of the appellant.

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**MARRIAGE AND DIVORCE—PROHIBITED MARRIAGES—CONFLICT OF LAWS.**—The rule established by the great weight of authority is opposed to the holding in the principal case, and is that a marriage good and valid by the laws of the state or country where it is entered into, is valid in every other state or country, although it appears that the parties thereto went into another state or country to contract such marriage, with an express view to evade the laws of their own country, the marriage in the foreign country or state must nevertheless be held valid in the country from which they departed for the purpose of marrying, and to which they returned to live: Monographic note to *State v. Shattuck*, 60 Am. St. Rep. 941, 942. In general this rule will not validate within a state marriages contracted without its borders which are prohibited by the laws of nature as generally recognized in christian countries: *Commonwealth v. Graham*, 157 Mass. 73; 34 Am. St. Rep. 255; In re *Wilbur's Estate*, 8 Wash. 35; 40 Am. St. Rep. 886. A further exception is made in the case of marriages which the local law-making power has declared shall not be allowed any validity, either in express terms or by necessary implication: See *Pennegar v. State*, 87 Tenn. 244; 10 Am. St. Rep. 648; In re *Wilbur's Estate*, 8 Wash. 35; 40 Am. St. Rep. 886.

## McGAW v. HAMILTON.

[184 PENNSYLVANIA STATE, 108.]

**SLANDER—WORDS ACTIONABLE PER SE.**—To say of the plaintiff that he swore to a lie before the aldermen is actionable per se.

**SLANDER—PRIVILEGED COMMUNICATIONS OR REMARKS IN THE LEGISLATIVE BODY, WHAT ARE.**—A member of a legislative body cannot take advantage of his official position to give expression to private slanders against others and then claim that his words were privileged.

**SLANDER—PRIVILEGED COMMUNICATION, WHAT IS NOT.**—A communication to be privileged must be made upon a proper occasion from a proper motive, and must be based upon a reasonable and proper cause.

**SLANDER BY REMARKS BEFORE A LEGISLATIVE BODY.**—A member of a legislative body who, upon a judgment in favor of the plaintiff being referred to, without any motion being made respecting it, says the plaintiff swore to a lie in the course of the trial which resulted in the judgment, is liable for slander. The remark, under the circumstances, is not privileged, or at all events, it should be left to the jury to determine whether the utterance was malicious, wanton, and designed to injure plaintiff under the color of a privileged communication.

William A. Sipe and William Blakely, for the appellant.

J. P. Hunter and A. M. Hunter, for the appellee.

**111 GREEN, J.** This was an action to recover damages for a verbal slander. The words uttered charged that the plaintiff had sworn to a lie in a proceeding before an alderman. As they practically charged that the plaintiff had committed the crime of perjury, they were actionable per se, and implied malice. The defense was that they were spoken by the defendant as a member of a borough council, and in the course of a debate upon a matter in which the plaintiff was interested. It seems the plaintiff, who was a printer, had presented a bill for printing to a previous council which had refused to pay it, and the plaintiff had thereupon sued the borough before an alderman and had recovered a judgment **112** for the amount of his bill. At a meeting of the council held on May 23, 1896, at which there were present a number of citizens, in addition to the councilman, the president of council called the attention of the members to the subject, saying that the plaintiff had recovered a judgment against the borough, and that the matter had been submitted to the borough solicitor who had advised that the bill should be paid. The weight of the testimony was that thereupon the defendant arose and, pointing toward McGaw, uttered the slanderous words in question. The plaintiff testi-



fied that the words were, "That man McGaw there, swore to a lie at Squire Madden's office in trying this case." Mr. McCullough, the president of the council, said the words were "That man there [turning and pointing to Mr. McGaw] had sworn to a lie before the alderman." Other witnesses swore to the utterance of the words in somewhat different language, but all of them testified that the defendant said that the plaintiff had sworn to a lie. The most of them said it was at the squire's office or before an alderman. There was no substantial difference on this subject between the witnesses. The defendant alleged that the words were spoken in the course of a debate. But the plaintiff claimed that there was no debate in progress on this or any other subject; that there was no motion pending on this or any other subject; that there was no motion pending in relation to this particular matter, and that the words were uttered recklessly and maliciously, and without any discussion. There was considerable testimony in support of this contention. All the witnesses concur that there was no motion pending. The chairman said, "After the matter had been presented by myself as chairman of the council—I was also chairman of the finance committee—Mr. Hamilton took occasion to rise to his feet and object to the payment of the bill, giving as his ground that that man there, turning and pointing to Mr. McGaw, had sworn to a lie before the alderman." He further said, "There had been no motion made. The matter had just come up for discussion, out of order, in fact." The plaintiff also said, "As soon as the matter was mentioned, and before any motion had been made to consider the matter, he sprang to his feet and pointed directly at me and stated, 'that man McGaw there swore to a lie at Squire Madden's office in trying this case.'" Another witness, James Harrison, said, 113 "Well, the president of council had brought up that bill of McGaw's that he had got judgment before Squire Madden against the borough, and after the president of council got through Mr. Hamilton rose to his feet and says, 'That man over there swore to a lie down at the alderman's office.' Q. Pointing to whom? A. Pointing toward Mr. McGaw."

There was more testimony of a similar character which it is not necessary to repeat. Now the question whether the slanderous words were uttered during the course of a debate in a legislative body is certainly not a question of law. If it were an undisputed question of fact, the court might pronounce upon it. But here it was testified by practically all the witnesses

that there was no debate in progress, and that there was no motion before the council. The substance of the evidence was that the president had merely stated to the council that the finance committee had considered the matter of the plaintiff's bill, and had referred it to the borough solicitor, who had advised that the bill be paid, when the defendant suddenly arose, and immediately uttered the slanderous words. Of course, a member of a legislative body cannot take advantage of his official position to give expression to private slanders against others, and then claim that the words were privileged because they were spoken in the course, and as a part, of a public discussion of a pending measure. In 13 American and English Encyclopedia of Law, page 406, speaking of absolute privilege, it is said: "But this privilege is not extended to words spoken unofficially, though in the legislative hall, and while the legislature is in session." In *Coffin v. Coffin*, 4 Mass. 9, 3 Am. Dec. 189, Parsons, C. J., delivering the opinion said, "But to consider every malicious slander uttered by a citizen who is a representative, as within his privilege because it was uttered in the walls of the representatives' chamber to another member, but not uttered in executing his official duty, would be to extend the privilege further than was intended by the people, or than is consistent with sound policy, and would render the representatives' chamber a sanctuary for calumny." In *Bradley v. Heath*, 12 Pick. 163, 22 Am. Dec. 418, Shaw, C. J., speaking of privileged communications said, "If the occasion is used merely as a means of enabling the party uttering the slander to indulge his malice, and not in good faith to perform his duty, or make a communication useful and beneficial <sup>114</sup> to others, the occasion will furnish no excuse." It was held in *White v. Nicholls*, 3 How. 267, that though a communication be privileged, if it be malicious, an action lies; but the plaintiff must aver and prove actual malice. Daniel, J., delivering the opinion, and remarking upon the rule as to privileged communications, said: "The privilege spoken of in the books should, in our opinion, be taken with strong and well-defined qualifications. It properly signifies this and nothing more, that the excepted instances shall so far change the ordinary rule with respect to slanderous or libelous matter, as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice, either by construction of the spoken or written matter, or by facts and circumstances connected with that matter, or with the situation

of the parties, adequate to authorize the conclusion." It was held in *Gray v. Pentland*, 2 Serg. & R. 23, that accusations preferred to the governor against a person in office are so far in the nature of judicial proceedings that the accuser is not held to prove the truth of them. It is excused if they did not originate in malice, and without probable cause. Yeates, J., speaking of the constitutional provisions protecting free speech, etc., said, "Wherever under the invidious mask of consulting the public welfare, he renders the investigation of the conduct of a public officer the mere vehicle of private malevolence, and a jury on the trial shall be fully satisfied that the publication was wanton and malicious, and without probable cause, he has no pretensions to escape unpunished." In commenting upon this case in *Briggs v. Garrett*, 111 Pa. St. 404, 56 Am. Rep. 274, Mr. Justice Paxson said: "It was not contended in that case, nor do I know that it has been in any other, that a man may use the cloak of a privileged communication as a cover for malice and falsehood." In the same case he defined a privileged communication thus: "A communication to be privileged must be made upon a proper occasion, from a proper motive, and must be based upon a reasonable or probable cause. When so made, in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel; actual malice must be proved before there can be a recovery." At the conclusion of the opinion in *Conroy v. Pittsburgh Times*, 139 Pa. St. 334, 23 Am. St. Rep. 188, our brother Mitchell said: "As a result we are of opinion that where the publication <sup>115</sup> charges an indictable offense, the presumption of innocence is prima facie evidence of falsity and want of probable cause, and sufficient to put defendant to proof of the facts to support his claim of privilege. It follows that this case should have been allowed to go to the jury."

From the tenor of the foregoing authorities it follows that, even in the recognized cases of absolute privilege, it is not enough that the slanderous words were uttered in a legislative hall or in a court of justice to establish a claim to absolute immunity. A further reference must be had to the circumstances, and to the occasion of the particular occurrence before that question can be determined. We have already alluded to the testimony as bearing upon the question whether the words were uttered in debate upon a pending motion. The weight of the evidence on that subject is in the negative, and hence its solution would have to be referred to the jury. But a slight further



reference to the testimony will tend to elucidate another aspect of the subject. The words used charged the plaintiff with having testified to a falsehood in a judicial proceeding before a magistrate. What had such a charge as that to do with the pending matter? There was no question of the personal fitness of the plaintiff for a pending appointment to office before the council. His private character was not at issue in any point of view. He had recovered a judgment against the borough in an adversary action for a demand. The claim had passed to judgment. The words spoken by the defendant did not connect the alleged perjury with that action. If they were uttered as to some other proceeding they were clearly foreign to any matter before the council, and in that event the utterance was clearly outside the pale of privileged communications in any aspect of the subject, and no proof of express malice would be necessary. Who is to determine that question? Manifestly the jury alone. But even if they did refer to the testimony of the plaintiff delivered on the trial of that case how does it result, as a matter of law, that they came within the limitations of an absolute privileged communication? The question as to the justice of the claim was not before the meeting. It had passed into judgment and the borough solicitor had advised the payment of the judgment. Upon the mere announcement to that effect the defendant immediately uttered the <sup>116</sup> slanderous words in question, when no motion was pending and no debate was proceeding. Was the utterance malicious and wanton, and designed to injure the plaintiff, under the cloak of a privileged communication? Who is to determine the question? Surely not the court, as a matter of law. There was other evidence as to a cause of angry dispute between the plaintiff and defendant in relation to the building of a town hall, as to which they were upon opposite sides. There was also some evidence of threats made by the defendant against the plaintiff. Was the defendant actuated by motives of revenge and malice on that account in uttering the words in question? All these things were for the jury, and the case should have been submitted to them under all the evidence. We are of opinion that it was error to withdraw the case from the jury.

Judgment reversed and procedendo awarded.

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**SLANDER — WORDS ACTIONABLE PER SE.**—Words involving moral turpitude on the part of the plaintiff, as well as charging him with an indictable offense, are slanderous per se: *Morgan v. Kennedy*, 62 Minn. 348; 54 Am. St. Rep. 647; *Kelley v.*

Flaherty, 16 R. I. 234; 27 Am. St. Rep. 739. A charge that one has committed perjury is actionable per se: *Gudger v. Penland*, 108 N. C. 593; 23 Am. St. Rep. 73, and note. To charge one with swearing falsely in court is actionable, as here it will be understood to mean a court having power to administer an oath: *Hamilton v. Dent*, 1 Hayw. (N. C.) 117; 1 Am. Dec. 552. *Contra*, *Ward v. Clark*, 2 Johns. 10; 3 Am. Dec. 383.

**SLANDER—PRIVILEGED COMMUNICATIONS, WHAT ARE.** A communication to be privileged must be spoken with reference to the subject matter in hand. If the speaker goes further, and makes a defamatory charge against the plaintiff about something having nothing to do with the matter in hand, it is not protected: *Jones v. Forehand*, 89 Ga. 520; 32 Am. St. Rep. 81, and note; *Callahan v. Ingram*, 122 Mo. 355; 43 Am. St. Rep. 583; *Clemmons v. Danforth*, 67 Vt. 617; 48 Am. St. Rep. 836; *Shadden v. McElwee*, 86 Tenn. 146; 6 Am. St. Rep. 821, and note.

## SWINT v. McCALMONT OIL COMPANY.

[184 PENNSYLVANIA STATE, 202.]

**EVIDENCE, PAROL TO SHOW THAT ONE OF THE AP-  
PARENT LESSORS WAS NOT A PARTY TO A LEASE.**—If a landowner and his son join as lessors in a lease of the former's property, the lessees may show by parol evidence that they did not deal with the son as a party in interest, but had him sign for some other purpose, as for instance, as a subscribing witness, or to show that his father, who was old and infirm, had not been imposed upon, or as a result of some mistake as to the necessity of his signing.

**COTENANTS, LEASE BY, TO WHOM RENT MAY BE  
PAID.**—If cotenants join in a lease reserving a common rent payable to them jointly, either may receive and give a valid receipt for the entire rent until the other gives notice that his share must be paid to him personally.

**COTENANCY.—AN ASSIGNMENT OR GRANT BY ONE OF  
TWO OR MORE COLESSORS** gives to his assignee or grantee the same right which he had to receive and receipt for the entire rents reserved by a lease.

J. L. Ritchey and James T. Buchanan, for the appellants.

A. Leo Weil and Charles M. Thorp, for the appellee.

<sup>204</sup> **WILLIAMS, J.** Peter Swint was the owner in fee simple of a farm in Allegheny county, containing about one hundred and twenty acres. J. E. Swint was his son. In 1885 he was of full age and living with his father on the farm. It is alleged by him that he was associated with his father in the cultivation of the soil under some sort of verbal agreement; but no distinct contract between them is shown. In 1885 Peter Swint made a lease for oil purposes of part of his farm to Hunter. Two years later he leased the whole farm, subject to the prior lease of Hunter to H. H. Locke. For some reason not distinct-

ly shown by the evidence J. E. Swint, the son, was joined with his father as a colessor in both <sup>205</sup> leases. The royalty reserved in the leases was one-eighth part of the oil produced, which was to be delivered to the lessor in the pipe lines of the company transporting the oil from the wells. It appeared that the lessees delivered the oil in the pipe line for the royalty to the lessors, and that the father, the owner of the land, and his vendees after him have taken possession of the entire one-eighth of the oil so delivered as royalty and receipted to the lessees therefor. It further appears that J. E. Swint gave no notice, prior to the bringing of this suit of his claim to have one-half of the royalty paid to him, or of any objection on his part to the payment of the whole royalty to his colessor.

In this action he now seeks to recover one-half of the royalties, regardless of the fact that they have been paid to the holder of his father's title, and without objection on his part. The first question arising upon these facts is, May the lessee show the circumstances under which the plaintiff signed the leases as a reply to his demand for one-half of the rent reserved? This would not amount to a denial of the landlord's title, but to a denial that, as to the son, the lease created that relation. If he signed as a subscribing witness, but put his name in the wrong place, if he signed to show that his father, who was old and infirm, had not been misled by the lessee, but had understood the nature and extent of the contract, or if he signed as the result of any mistake as to the necessity or effect of his signature accompanying that of his father, there could be no good reason why the fact should not be known, and the effect given to the execution of the leases by him which was in contemplation at the time. If the lessees did not deal with him as a party in interest they are not estopped, by his or their mistake, from showing the truth. On the other hand, if they treated him as interested in the surface to such an extent as to render his consent to the lease necessary, and joined him as a colessor for that reason, they would fall under the rule which he invokes, and would not be allowed to deny his title. The question about the division of the rent would then be for the colessors to settle between themselves, and it would not interest the lessees until after notice from one or both of the joint claimants demanding a specific part of the rent which had been jointly reserved. But if we assume that the lease was intended to be joint, notwithstanding <sup>206</sup> the fact that no interest in the farm is shown in the son, and that the father intended to share the royalties with



him, although the title was in himself alone, we come to the next question, viz: What and against whom is the remedy of the son upon the facts before us? The royalties reserved are payable to the colessors jointly. All the royalties accrued up till the time this suit was brought had been paid to the father or his assigns with the knowledge of the son, and without protest or notice of his individual claim from him. One tenant in common cannot make a valid lease of the common property without the consent of his cotenants. He can dispose only of his own undivided share. If, however, the cotenants join in a lease reserving a common rent payable to the lessors jointly, either of them may receive and give a valid receipt for the entire rent until notice by one or more of the cotenants that his share must be paid to himself: Wood on Landlord and Tenant, 125. So upon such a lease the tenants in common may join in one action or in one distress for rent: Jones v. Gundrim, 3 Watts & S. 531. This was the rule of the common law. Littleton gives it thus: "If two tenants in common make a lease of their tenement to one for a term of years reserving rent, and the rent be in arrears, the tenants in common shall have an action of debt against the lessee and not diverse actions, for that action lies in the personalty": Littleton's Tenures, sec. 316. In Powis v. Smith, 5 Barn. & Ald. 851, the rule is stated in these words: "It is clear that if there be a joint lease by two tenants in common the two may join in an action for rent; but if there be a separate reservation to each, then there must be separate actions." When there has been a joint reservation of rent, and rent has been paid without objection to one of the persons jointly entitled to receive it, the demand for rent is satisfied. Its division among those entitled as between themselves to share in it must be settled by some appropriate action to secure an account from the party actually receiving it. This, in the case of two persons jointly entitled to receive the rent, may be account render and under some circumstances assumpsit: Gillis v. McKinney, 6 Watts & S. 78. Since the demand made by this action the questions just considered will have no place. The plaintiff is in the position of demanding one-half of the rent or royalty reserved and requiring its payment to him. The receipt of his colessor will therefore <sup>207</sup> bind him no longer; but if he is legally entitled to share in the rent he must be separately dealt with in its payment. This question cannot be settled on this record. It is suggested that the assignment by the father of his interest in the royalties amounted to a severance upon which

the rent was apportioned as matter of law, so that the plaintiff had a right to recover one-half of the rent, notwithstanding the payment of them to the colessor or his assigns. But we do not see that there is room for the doctrine of apportionment in this case. "Apportionment is defined as a division or partition of a rent or common, or a making of it into parts." This may be by the act of the law or the act of the parties. If freehold and leasehold premises are demised at an entire rent, upon the death of the lessor, the rent must be apportioned as matter of law, since the freehold goes to his heirs and the leasehold to his personal representatives. If the lessor of premises demised at an entire rent sells a portion of the demised premises to another, an apportionment is made necessary by the act of the lessor. But under the evidence in this case there was no division of the rent into parts as a result of the transfer by the father of all his right and interest in the royalties reserved to another. This transfer did not affect the son. It did not part the rent. The assignee became a tenant in common in the rent with the son, just exactly as the father had been before the assignment was made. There was no severance of the demised premises. The relation of the lessees to the lessors was not changed, there was therefore no reason in law, and none arising from the act of the parties, for an apportionment of the rent in this case. If the father had sold a part of the reversion to a stranger, his right to an apportionment of rent would have attached the instant the sale was made to him: *Linton v. Hart*, 25 Pa. St. 193; 64 Am. Dec. 691; and the landlord who thus sells part of the demised premises to another will not be liable for the trespasses of his vendee, nor forfeit his right to his share of the rent because of an ouster of the tenant by his vendee from such part of the demised premises as passed to the vendee: *Reed v. Ward*, 22 Pa. St. 144. This is because after the apportionment the respective rights of vendor and vendee are separate and distinct. In the case before us the reversion was not divided; the leasehold was not divided; the right of neither of the colessors was divided. There was therefore <sup>208</sup> no party in a position to claim an apportionment of the rent, and the allotment of any specific portion thereof to himself, and for that reason the doctrine of apportionment has no place in this controversy. The lease, in the best view of it for the plaintiff, is a joint lease by the tenants in common for an entire rent. Either of the colessors could assign his interest in the lease without affecting in the slightest degree the rights or remedies of the other.

The judgment is affirmed.

**COTENANCY—RIGHT OF ONE COTENANT TO RECEIPT FOR RENTS.**—In the absence of express notice not to do so, it seems clear that a lessee holding under a joint lease may pay the whole of the rent to either of his lessors, and that such payment will be a full discharge of the claims of each and all of such lessors, by whatever cotenancy their title may be held: *Freeman on Cotenancy and Partition*, 2d ed., sec. 177. See *Hodges v. Heal*, 80 Me. 281; 6 Am. St. Rep. 199. But the tenant receiving such rents must account therefor to his cotenants: *Monographic note to Early v. Friend*, 78 Am. Dec. 667.

**LANDLORD AND TENANT—ASSIGNMENT OF REVERSION—APPORTIONMENT OF RENT.**—The sale of land by the lessor cannot affect the rights of the tenant; it simply places the grantee in the place of the grantor in respect to the rent: *Gibbons v. Dillingham*, 10 Ark. 9; 50 Am. Dec. 233. A purchaser from a cotenant succeeds only to the latter's interest: *Page v. Branch*, 97 N. C. 97; 2 Am. St. Rep. 281. A lessor may grant the whole or any part of premises out of which rent issues, and the lessee will be bound to pay the whole or a proportionate share of the rent to the grantee, and the latter has all the remedies to enforce payment which the lessor had: *Monographic note to Washington etc. Gas Co. v. Johnson*, 10 Am. St. Rep. 564; *Linton v. Hart*, 25 Pa. St. 193; 64 Am. Dec. 691.

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## BELL v. COUNTY OF ALLEGHENY.

[184 PENNSYLVANIA STATE, 296.]

**RES JUDICATA.**—IF IN AN ACTION BY A PUBLIC OFFICER to recover a salary the court determines that his office is a salaried office, and, as a consequence, that he is entitled to a designated salary only, he cannot, in a subsequent action for salary afterward accruing, recover a larger sum on the ground that in the first action the statute entitling him to a greater compensation was neither pleaded nor referred to in argument.

D. T. Watson and John F. Sanderson, for the appellant.

N. S. Williams, county solicitor, for the appellee.

**299 DEAN, J.** John A. Bell was elected county treasurer of Allegheny county in November, 1890, for the term of three years. He assumed the duties of the office the first Monday of January, 1891, and served out his term. By the census of 1890, the population of the county was five hundred and fifty-one thousand nine hundred and fifty-nine. The plaintiff claimed that his salary, in a county of this population, by the act of March 31, 1876 (Public Laws, 13), and the supplement of June 13, 1883 (Public Laws, 113), was fixed at ten thousand dollars per year. The defendant contended that his salary was fixed by a special act relating to Allegheny county, of May 1, 1861 (Public Laws, 450), and by a supplement of March 11, 1870 (Public Laws, 373), at four thousand five hundred dollars per year. The



plaintiff filed statement of his demand, which was for the last nine quarters of his salary for the term, the first three quarters having been demanded in another suit. The amount claimed for the last nine quarters was twenty-two thousand five hundred dollars, being at the rate of ten thousand dollars per year. Suit was brought January 2, 1897. On September 22, 1897, the county filed a demurrer to the claim, denying plaintiff's right in law to recover the amount demanded. The court below sustained the demurrer and entered judgment <sup>300</sup> for defendant, saying: "We regard the questions raised by the demurrer as having been settled by the case of *Bell v. Allegheny County*, 149 Pa. St. 381, and the orders made therein by the supreme court."

What was settled by the case cited? This same officer, claiming his salary was fixed at ten thousand dollars by the general acts of 1876 and 1883, brought suit against the county for the first three quarters of the same term, for which he now claims the remaining nine quarters. Demurrer was filed averring the same obstacles to recovery as now, the special acts of 1861 and 1870, fixing the salary of the county treasurer of Allegheny county at four thousand five hundred dollars. Then, the court below was of opinion that the special statutes were repugnant to the general law, and were repealed by it. The demurrer was overruled and judgment entered for plaintiff. The county appealed to this court. In an opinion rendered by Justice Heydrick we reversed the judgment, for the reason that there was no such repugnancy between the local and general statutes, so far as related to the county treasurer, as repealed by implication the former. Both statutes established fixed salaries for county officers, among them the county treasurer; and it was said: "The mandate of section 5, article 14, of the constitution, that the compensation of county officers shall be regulated by law was satisfied, in respect to the treasurer of Allegheny county, by the special act of 1861 and its supplement; and so far as that officer was concerned, the legislature was not bound to act, and therefore cannot be presumed, contrary to the well-known canons of construction, to have intended to act." That is, by the act of 1861 and its supplement, the county treasurer was compensated by a fixed salary; that was all that was intended by the constitution and act of 1876, viz., to compensate all officers in counties of a certain class, of which Allegheny county was one, by fixed salaries. Bell, in his statement in that case, averred that his office was a county office, to be compensated by a fixed

salary, but that the salary was fixed by the general, and not by the special, act. The demurrer filed admitted the facts, but not the legal conclusion. The facts being established, the legal conclusion from them, by this court, was that he was entitled to a salary of four thousand five hundred dollars per year, under the special acts, and judgment was finally ordered to be so entered. The opinion in *Bell v. Allegheny* <sup>301</sup> County, 149 Pa. St. 381, was handed down May 23, 1892; on October 3, 1894, the opinions in *McCleary v. Allegheny County*, 163 Pa. St. 578, 588, 589, were handed down, deciding that these officers came under the provisions of the general act of 1876, because, under the local acts, they were compensated by part salary and in part by fees; that as the intent of the general act was to compensate these officers, solely, by a fixed salary, and to compel the payment of all fees into the county treasury, there was an irreconcilable repugnancy between the two acts, and the local act must go down, in face of the general act passed in obedience to a constitutional mandate. Mr. Bell, the plaintiff, then discovered that in addition to the fixed salary of four thousand five hundred dollars he was compensated by a fee under a local liquor act of April 3, 1872, the twentieth section of which reads as follows: "The county treasurer of Allegheny county is hereby required to perform all the duties imposed upon him by the provisions of this act, and to furnish the licensee with printed bonds to be filled up by them as required by this act. The blank bonds to be furnished at the expense of the said county treasurer, who shall receive therefor a fee of one dollar." We do not think this provision directs payment of a fee as compensation for services. The primary intent of the act, evidently, was to promote uniformity in the framing of the bond, by directing the blanks to be prepared and issued by a particular officer. The act would have expressed the same intent had it directed that the bonds should be furnished by the county treasurer at the actual cost thereof, to be paid by the licensees, or, that they should be furnished by the county treasurer at an expense to the licensees not exceeding one dollar. The obvious intent was, not to compensate the treasurer, but to reimburse him for money laid out in procuring the printed blank bonds. He may have a profit or may not, depending on the quantity of printed matter, the style of printing, the quality of paper, and printer's charges. If he have a profit, that was not, apparently, the purpose of the act; its purpose was to reimburse him for the expense, which is not the less plain

because the word "fee" is used. But, whatever construction is placed on this act, we do not base our judgment upon it. We prefer to decide the case on the main question, Is the judgment in *Bell v. Allegheny County*, 149 Pa. St. 381, *res adjudicata*? Is the issue in this case settled <sup>302</sup> by the judgment in that case? To warrant that judgment it must have been adjudged, that, under the local acts, the county treasurer was compensated solely by a salary; if the fact were that "the compensation was partly by fees and partly by salary," we were bound to render a judgment for plaintiff under the act of 1876. How can it then be argued that the fact now urged, if it existed, was not passed on?

It is urged that the fact of the act of 1872 was not noticed, and appeared neither in the pleadings nor argument; concede it; the fact that the office was salaried under the local act at four thousand five hundred dollars clearly appeared; as no fact of compensation by fee was either pleaded or argued, legally, and so far as affects the judgment, no such fact existed, and that is an inevitable inference from the judgment. The court then further adjudged, that, as the officer was compensated exclusively by salary, his compensation was not affected by the general act. And that case settled this, because the cause of action, the point on which the contention turned, and the parties, are the same. The cause of action in the first case was the right of plaintiff to demand, either a yearly salary of four thousand five hundred dollars or ten thousand dollars, and the obligation of defendant to pay one or the other; the contention was, which amount was allowed by law? And this is precisely the controversy between the parties before us. That additional or cumulative evidence is presented of a fact necessarily adjudicated in the former case, or that the demand is for compensation as to subsequent months of the same official term, leaves it still the same cause of action, to be adjudicated on the same statutes and the same facts, though, as to the last, not the same evidence. If the fact was necessarily determined it is a bar: *Holley v. Holley*, 96 N. C. 229; *Harryman v. Roberts*, 52 Md. 74. In *Wilson v. Deen*, 121 U. S. 525, the action was by the landlord on a lease for a term, the rent payable monthly. The defendant had guaranteed the payment of the rent. In an action against him for the first month he defeated a recovery on evidence that the lease was obtained fraudulently. In another action against him for the rent of subsequent months, it was held that the first judgment was a bar to recovery, Justice Field saying: "It (the



first judgment) determined, not merely for that case, but for all cases between the same parties, not only that there was nothing due for the month of December, but that the lease <sup>303</sup> itself was procured by fraud." The matter in controversy was the lease; making separate demands and instituting separate suits for the monthly installments as they fell due did not change the one cause of action, the written instrument, on which depended the right of plaintiff and obligation of defendant; that being settled by the first judgment, the defendant could not be harassed with suits for the subsequent monthly installments. In *Kilheffer v. Herr*, 17 Serg. & R. 319, 17 Am. Dec. 658, an action on the case for continuance of a nuisance, it appeared from the record offered in evidence by plaintiff that ten years before there had been a suit between the same parties, the same pleas, and concerning the same controverted matter, in which the plaintiff obtained judgment; the defendant's plea on the second trial, among others, was a license from plaintiff for the erection of the dam or nuisance complained of, which antedated the first suit. At the second trial, he had new and significant evidence tending to show that he had not exceeded in the height of his dam, the scope of his license. The court says: "The first question which presents itself is the conclusiveness of the record of the verdict in the first suit; and on this part of the case the court entertain no doubt. A verdict for the same cause of action between the same parties is conclusive; for when a court of competent jurisdiction has adjudicated directly upon a particular matter, the same point is not open to inquiry in a subsequent suit for the same cause, and between the same parties. It may be a great misfortune, as in this case, that from causes over which he had no control the party may not have been properly prepared for trial. It is, however, a misfortune which this court cannot remedy, as the rule is settled on the principle that there must be an end of litigation, and to provide against the loss of testimony; and as the defendant had an opportunity of showing the truth of the fact, he shall not afterward be permitted to contradict a record to which he is a party. He is estopped to deny that which has been solemnly ruled against him. We shall, therefore, take it as settled that the erection of the dam complained of in the first suit is not open to inquiry in an action for the continuance of the nuisance. All the plaintiff was bound to do was to give in evidence the former recovery, to prove that the dam had undergone no alter-

ation, but continued the same, and his right of action was complete."

<sup>304</sup> To the same effect is *Long v. Long*, 5 Watts, 102, also a second action for continuance of a nuisance. *Philadelphia v. Ridge etc. Ry. Co.*, 142 Pa. St. 493, 24 Am. St. Rep. 512, cited, and so confidently relied on by appellant, has no application to the case in hand. There, under the act of 1859, the railway company was required to pay to the city six per cent of its dividends whenever its dividends exceeded six per cent of its capital stock; afterward, by act of 1872, the amount of tax was lessened by requiring the company to pay only six per cent of the dividends in excess of six per cent on its capital stock. The company defaulted in payment under the second act for the years 1872 to 1879 inclusive, and the city brought suit for the taxes of those years, under the act of 1872. The company admitted its liability, under the act, but contended that a proper construction of it made it answerable only when any single declared dividend exceeded six per cent of its capital stock; the city contended that under such construction the city might derive no revenue, and the manifest intent of the act would be defeated; on this question the case came before this court, and it was decided that the company's liability was to be determined, not by the single dividends, but by the aggregate of the annual dividends. This was all that was adjudicated. The constitutionality of the act was not questioned: See *Philadelphia v. Ridge etc. Ry. Co.*, 102 Pa. St. 190, decided in 1883. Afterward, in 1889 (see *Ridge Avenue etc. Ry. Co. v. Philadelphia*, 124 Pa. St. 219), in a contention between the city and railway company, as to the obligation of the latter to pave streets, this court declared the act of 1872 unconstitutional and void. Then the city brought suit for the taxes of the years 1880 to 1883, inclusive, computing them, not under the act of 1872, but under the act of 1859, which imposed the higher rate. The company defended on the ground that in *Philadelphia v. Ridge etc. Ry. Co.*, 102 Pa. St. 190, the city having brought suit under the act of 1872, and this court having adjudged and determined the construction of that act in the city's favor, the whole matter was *res adjudicata*, and the city's demand must be determined by the act of 1872. This court said, no; that while that suit settled the taxes for the years preceding the act of 1872, under which act the suit was brought, notwithstanding its unconstitutionality, yet the city was not barred by that judgment from alleging the unconstitutionality of the act as to the taxes of

subsequent years. Nor, could there <sup>305</sup> well have been any other decision. After the act of 1872, in another suit, had been declared unconstitutional in *Ridge Avenue etc. Ry. Co. v. Philadelphia*, 124 Pa. St. 219, in a legal sense, there was no such act in existence; the right of plaintiff and the obligation of defendant were wholly statutory; and the only valid statute establishing both was that of 1859. And, while the validity of the act of 1872 was impliedly admitted by both parties and assumed by the court in the first suit, and a judgment entered by virtue of it which bound all parties in that subject of contention, yet after it was declared void, it bound not the parties as to their future conduct, nor the courts, as an adjudication in demands maturing subsequently. If, in this case, the local salary act of 1861 had been declared unconstitutional after the decision in *Bell v. Allegheny County*, 149 Pa. St. 381, the appellant might forcibly argue that the only act having a legal existence fixing his salary is that of 1876; and to sustain this position, *Philadelphia v. Ridge etc. Ry. Co.*, 102 Pa. St. 190, might be pointedly cited. But the law impelling the court to the decision in *Bell v. Allegheny County*, 149 Pa. St. 381, has not been one whit changed since that decision was rendered. The point made by appellant, that *Philadelphia v. Ridge etc. Ry. Co.*, 102 Pa. St. 190, sustains his position that his present suit is for a different cause of action than the first, as we have before noticed, is not sound. The first action proceeded on the assumption that the act of 1872 was constitutional, the second, that it had no existence, and the city's claim was fixed by act of 1859; the unconstitutionality of the act gave rise to a new cause of action, that fixed by the first act, six per cent of the six per cent dividends declared, instead of six per cent of dividends in excess of six per cent. If the act of 1872 had been valid the first judgment would have barred the city from any other or greater demand than was asserted in that case, because the right of the city and obligation of the defendant would have been precisely the same; but, wiping that act from the statute book changed the cause of action, as to the succeeding years, to one based on an entirely different statute, and, of course, the judgment was no adjudication of this demand.

The suggestion of the hardship resulting from an insufficient compensation to a competent officer performing such onerous and responsible duties as are imposed upon the county treasurer of the second most populous county of the state is without <sup>306</sup> weight. No man is compelled to accept the office at an insuffi-



cient salary. If he do accept, he then voluntarily undergoes the hardship. If competent men decline the office because of the meager salary, and it falls into the hands of the incompetent, the people can easily cure the evil by moving the legislature to repeal the local statute, which would at once raise the salary to ten thousand dollars.

The language of this court in *Marsh v. Pier*, 4 Rawle, 273, 26 Am. Dec. 131, on the rule of *res adjudicata*, is forcible, in view of the character of this litigation: "A judgment of a proper court, being a sentence or conclusion of the law, upon the facts contained within the record, puts an end to all further litigation on account of the same subject matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the courts and juries, even afterward, as long as it shall remain in force and unreversed." And in the same case: "A contrary doctrine, as it seems to me, subjects the public peace and quiet to the will or neglect of individuals, and prefers the gratification of a litigious disposition on the part of suitors, to the preservation of the public tranquillity and happiness."

All the assignments of error are overruled and the judgment is affirmed.

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**JUDGMENTS—CONCLUSIVENESS OF.**—A judgment or decree of a court of competent jurisdiction is final, not only as to the subject matter, but also as to every other matter which the parties might have litigated and had decided in the case: *Hentig v. Redden*, 46 Kan. 231; 26 Am. St. Rep. 91, and note. Its conclusiveness is not confined to the matter litigated, but includes the finding of any facts which were in issue and necessarily decided: *State v. Branch*, 134 Mo. 592; 56 Am. St. Rep. 533. The principle of *res judicata* extends not only to questions of fact and of law which were decided in the former suit, but also to grounds of recovery or defense which might have been, but were not, presented: *Harmon v. Auditor*, 123 Ill. 122; 5 Am. St. Rep. 502; *Huntley v. Holt*, 59 Conn. 102; 21 Am. St. Rep. 71, and note.

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## MURPHY'S ESTATE.

[184 PENNSYLVANIA STATE, 310.]

**CHARITABLE USE, BEQUESTS FOR, WHEN NOT VOID FOR UNCERTAINTY.**—A devise or bequest of the balance of the testator's estate to be divided among such benevolent, charitable, and religious institutions as his executors or their successors shall select, is not void for uncertainty.

**CHARITABLE USES — DISCRETIONARY POWERS IN TRUSTEES.**—In the case of a will making a charitable bequest, it

is immaterial how vague, indefinite, and uncertain the objects of the testator's bounty may be, provided there is a discretionary power vested in some one over its application to those objects.

**CHARITABLE USE—WHAT MAY BE SUSTAINED AS.—**

A bequest for benevolent, charitable, and religious institutions or associations to be selected by the testator's executors is sustainable as a charitable bequest.

**EXECUTORS OR TRUSTEES—POWERS OF SURVIVORS.**

When a will confers a power on the testator's executors or their successors, the survivor of them may execute the power.

John Wilson, for the appellant.

George B. Gordon, John Dalzell, and William Scott, for the Homeopathic Hospital, Cohen & Israel, for the Allegheny Hospital, A. M. Todd and Thomas Heriott, for the Washington & Jefferson College, and William A. Way, for the Presbyterian Hospital.

**317 PER CURIAM.** We find nothing in this record that requires a reversal or modification of the decree from which this appeal was taken; nor do we think that any of the questions presented in the specifications of error require further notice than is taken of them in the opinion of the learned judge who entered the decree.

On his opinion, the decree is affirmed and appeal dismissed at appellants' costs.

The opinion of the trial judge, thus referred to and adopted, was as follows:

**310** "William R. Murphy died testate on April 18, 1896. By his will dated July 12, 1894, he made the following provisions for his wife, who died prior to him, to wit, on September 29, 1895:

"Second. I will and bequeath to my wife, Matilda T. Murphy, the sum of five thousand (\$5,000) dollars, and one hundred **311** and fifty (150) shares of the stock of the Pennsylvania Railroad Company, also all my household furniture, my pew in the First Presbyterian Church of Pittsburg and my lot in the Allegheny Cemetery; these bequests with the provisions made in clause third, to be in lieu of her dower and statutory interest in my estate: To this provision in my will I add, however, the following request, that, if at the expiration of one year after my decease the value of my estate has not materially decreased from the appraisers' estimate, then she would of her own free will and accord make the following distribution of the above named Pennsylvania Railroad Company stock. To my nephews, J. W. Murphy, J. M. Kurtz, and Daniel Cooper, twenty

(20) shares each; to my nieces, Annie Murphy, Elizabeth Kurtz, Lucy Randall, and Martha Crane, ten (10) shares each; to my nephews, James M. Cooper (son of Wm. M. Cooper), Frank Cooper and William M. Cooper (sons of Daniel Cooper), to my niece Fannie Cooper (daughter of Daniel Cooper), and to James M. Kurtz, in trust for his children, ten (10) shares each.

“Third. The rest and residue of my estate of every kind, I give and bequeath to David Robinson, his heirs and assigns, in trust, however, for the following purposes: to invest and reinvest the same in such securities as he shall deem safe, and the net income and profits thereof to pay to my wife, Matilda T. Murphy, during the term of her natural life, and at her decease the principal sum of said residuary estate to be by said trustee paid as follows:’

“He then gave certain pecuniary legacies and provided as follows in the last paragraph:

“6. The balance of my estate, after the payment of the above legacies and the collateral inheritance tax on them, to be divided among such benevolent, charitable, and religious institutions and associations as shall be selected by my executors, or their successors.

“It is my will that, should there be a deficiency in my estate, the above legacies shall abate proportionately, save that I wish those to the Boards of Foreign Missions and Home Missions to be paid in full and free from any tax.

“I appoint David Robinson and my wife, Matilda T. Murphy, executors of my will, without bonds, no bonds to be required of them as trustees of the residuary estate.’

312 “David Robinson having died prior to testator, he, on February 7, 1895, by codicil, appointed William A. Robinson as trustee and executor instead of said David Robinson, deceased.

“William A. Robinson, as surviving executor, filed this account and by writing filed, made the following distribution of the residue of the estate:

“To the Home for Aged Protestant Women, at Wilkesburg, Penna., five hundred dollars. To the Passavant Memorial Home for Epileptics, Rochester, Penna., five hundred dollars. To the trustees of Washington and Jefferson College at Washington, Penna., for permanent funds, one thousand dollars. To the Trustees of the Western Theological Seminary of the Presbyterian Church in Allegheny, Penna., in aid of fund for establishing a chair of Sacred Rhetoric and Elocution, one



thousand dollars. The balance of the said estate to be divided into four equal parts: One of said parts to be given to each of the following institutions, namely: To the Homeopathic Medical and Surgical Hospital and Dispensary of Pittsburg, Penna., for permanent funds, one of said four parts; to the Allegheny General Hospital in Allegheny, Penna., for permanent funds, one of said four parts; to the Trustees of Washington and Jefferson College at Washington, Penna., for permanent funds, one of said four parts, and to the Presbyterian Hospital of Pittsburg and Allegheny, Penna., for permanent funds, one of said four parts.'

"It is claimed by the next of kin: 1. That the bequest in the residuary clause is void for uncertainty; 2. That the surviving executor had not the power alone to designate the beneficiaries; and 3. That the lapsed legacy to testator's wife did not fall into the residue.

"In *Missionary Society's Appeal*, 30 Pa. St. 425, it was said that, 'In the case of a will making a charitable bequest, it is immaterial how vague, indefinite, and uncertain the objects of the testator's bounty may be, provided there is a discretionary power vested in some one over its application to those objects.' Such discretionary power here is vested in the executors; but it is contended upon the authority of *Morice v. Bishop*, 9 Ves. 399, where the bequest was for such objects of benevolence and liberality as the trustee in his discretion should most approve, and other English cases that, as the bequest here <sup>313</sup> is for benevolent as well as charitable uses, it is void for uncertainty. In *Witman v. Lex*, 17 Serg. & R. 88, 17 Am. Dec. 644, Gibson, C. J., in commenting upon *Morice v. Bishop*, 9 Ves. 399, said that such a gift would probably be upheld in Pennsylvania; but there have been no cases cited of our supreme court directly in point; there are, however, from other states. In *Saltonstall v. Sanders*, 11 Allen, 446, Mr. Justice Gray sustained a trust 'for the furtherance and promotion of good morals, and in aiding objects and purposes of benevolence and charity.' On page 468 he said: 'The decisions of the English courts since our revolution are of no binding authority on this court, and upon such a question as the interpretation of the word "benevolence," as connected with "charity," of no particular weight when opposed to the well-settled meaning of the words in our own law.' And on page 470, 'Whatever, therefore, may be the meaning in the law of Massachusetts of the word "benevolence" by itself there can be no doubt that when used in connection with "char-

ity" it is synonymous with it.' A still stronger case is *Rotch v. Emerson*, 105 Mass. 431, where a gift to trustees 'to be by them applied for the promotion of agricultural or horticultural improvements or other philosophical or philanthropical purposes at their discretion' was sustained as a charitable bequest. In *Goodale v. Mooney*, 60 N. H. 528, 49 Am. Rep. 334, the following bequest was sustained: 'I place the remainder of my property in the hands of my executors to be distributed by them after my decease, among my relatives and for benevolent objects.' On page 534 the court said: 'In many cases the word "benevolent" has been coupled with "charitable" or some equivalent word, or has been mentioned in connection with such public institutions as to show an intent to make it synonymous with charity.' They are also synonymous in their ordinary meaning: See Webster's Dictionary.

"It seems then that the word 'benevolent,' as used by the testator, is to be construed as synonymous with 'charitable,' and the residuary bequest is therefore not void for uncertainty. But it is contended that William Robinson, as the sole surviving executor, had not the power to designate the beneficiaries under the residuary clause. If the power were incident to the persons of the executors and not to the office, this position would, perhaps, be well taken. The testator provided that the selection <sup>314</sup> of the beneficiaries should be made 'by my executors or their successors.' The distribution of the residuary estate was not to be made until after the death of his wife; and it is not probable he anticipated that the beneficiaries would be designated until then, and his wife, as executrix, would not, therefore, take part. The word 'successors' appears to indicate that he intended the power of selection should be exercised by the persons filling the office after his wife's decease; and the power seems to be annexed to the office, and not to the person. In *Perry on Trusts*, section 499, it is said: 'The question is whether the donor reposed a personal trust and confidence in the trustees appointed, or whether he reposed the power in whomsoever might in fact fill the office of trustee.' And in *Hill on Trustees*, 489, 'Where the power is annexed to the office of trustees, and one or more of the trustees refuse to accept the trust, it is settled that those who accept may exercise the power.' We think the surviving executor had power to designate the beneficiaries, and as they are all charitable to some extent, his designation is valid, and distribution must be made accordingly.

"The legacy to his wife was given to her absolutely, coupled

with a suggestion that under certain contingencies she should give the Pennsylvania railroad stock to certain persons. The words are merely precatory, created no trust, and did not in any way qualify the absolute gift to her. The legacy lapsed by reason of her death before the testator, and as the will contains a general residuary clause, and it is evident it was the intention of the testator to dispose of his whole estate, the lapsed legacy falls into the residue, and must be distributed as part of it to the beneficiaries designated by the executor: *Gray's Appeal*, 147 Pa. St. 67; *Powell's Appeal*, 138 Pa. St. 322; *Reimer's Estate*, 159 Pa. St. 212."

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**CHARITIES—VALIDITY OF BEQUESTS TO—DISCRETION OF TRUSTEES.**—A trust to executors to distribute a residuum among the testator's relatives and for benevolent objects, in such sums as they shall deem best, is valid: *Goodale v. Mooney*, 60 N. H. 528; 49 Am. Rep. 334. A gift to one of moneys or property "to be disposed of by him for such charitable purposes as he shall think proper," is a good charitable trust: *Minot v. Baker*, 147 Mass. 348; 9 Am. St. Rep. 713, and note; extended note to *Bridges v. Pleasants*, 44 Am. Dec. 100, 101. Compare *Gambell v. Trippe*, 75 Md. 252; 32 Am. St. Rep. 388, and note.

**TRUSTS—TRUSTEES—RIGHT OF SURVIVORSHIP.**—Where an estate is granted or devised to two or more to hold in trust, there is no doubt that at the common law they take as joint tenants with the benefit of survivorship, and when one of them dies, that those surviving take the whole estate, and with it the power to execute the trust: Monographic note to *Tyler v. Herring*, 19 Am. St. Rep. 275.

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## STEARNS v. ONTARIO SPINNING COMPANY.

[184 PENNSYLVANIA STATE, 519.]

**NEGLIGENCE WILL NOT BE PRESUMED** from the mere happening of an accident and a consequent injury, except when contractual relations exist between the parties, as in the case of carriers of passengers and some others. Plaintiff must, to sustain a recovery, prove either actual negligence or conditions which are so obviously dangerous as to admit of no inference other than that of negligence.

**NEGLIGENCE—BUILDING, LIABILITY OF OWNER FOR THE FALLING OF A DANGEROUS IMPLEMENT ON PERSON BENEATH.**—If an axe falls from the fifth story of a building striking and killing a person lawfully in the area outside it, and there is no proof of negligence on the part of the owner of the building, and the evidence of the person using the axe when it fell shows due care on his part, a nonsuit is properly entered in an action against the owner to recover for the damages thus inflicted.

Alfred H. Haig, James M. Beck, and William F. Harrity, for the appellant.

John G. Johnson, for the appellee.



<sup>522</sup> FELL, J. The plaintiff's testimony showed that her husband, while lawfully in an areaway in the building in which he was employed, was struck on the leg by an axe head and thereby received a wound from the effects of which he died; and that the axe head fell from an open doorway in the fifth story of the building, which was occupied by the Ontario Spinning Company, the corporation defendant. The plaintiff then called Clement, an employé of the defendant, who testified that at the time of the accident he was using the axe in question in cutting or breaking the iron bands on a bale of cotton; that he had so used the same axe for about two years; that he had never had any trouble with it; that he had frequently examined it to see whether it was in good condition; that on this occasion, while he had not made any particular examination, "it seemed to be in first class condition"; that he had noticed nothing wrong with it; that immediately before the accident he had been using it for about two minutes, and had cut ten bands from <sup>523</sup> a bale of cotton, and that when he raised it to strike again the head flew off the handle and out of the open doorway behind him.

The doctrine of *res ipsa loquitur* applies where, under the circumstances shown, the accident presumably would not have happened if due care had been exercised. Excepting where contractual relations exist between the parties, as in the case of carriers of passengers and some others, negligence will not be presumed from the mere happening of the accident and a consequent injury, but the plaintiff must show either actual negligence or conditions which are so obviously dangerous as to admit of no inference other than that of negligence. The burden which is thus thrown upon the defendant is not that of satisfactorily accounting for the accident, but merely that of showing that he used due care. It is therefore unnecessary in this case to consider whether proof of the accident and its attendant circumstances was sufficient to put the defendant to its defense, for if any presumption of negligence had been raised by the previous testimony, it was a presumption of fact only, and was entirely rebutted by the testimony of Clement, the defendant's employé, who was the last witness called by the plaintiff. His evidence showed that he was a competent man, and that he had used due care, and it was at the same time entirely consistent with the happening of the accident as described by the other witnesses. For to those who are familiar with the construction of the ordinary axe, such as the one in this case was shown to

have been, it is readily conceivable that the head and handle may part although apparently securely joined, and to those who are familiar with their use it is known that they sometimes do so without previous warning.

What, then, was there to submit to the jury? The defendant, as we have said, was not bound to account for the happening of the accident. It had been relieved by the plaintiff of the burden, if any there was, of showing the exercise of due care. The plaintiff's whole testimony not only failed to show negligence on the part of the defendant, but rebutted any presumption of negligence which may have arisen, and affirmatively proved its absence.

We are of the opinion that the nonsuit was properly entered, and the judgment is affirmed.

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**NEGLIGENCE—PRESUMPTION OF, FROM HAPPENING OF ACCIDENT.**—There are many cases in which the nature of the accident may itself establish a *prima facie* case of negligence against a defendant, and cast upon him the burden of proof to show that such accident occurred without his fault. These cases are noticed and discussed in the monographic note to Philadelphia etc. R. R. Co. v. Anderson, 20 Am. St. Rep. 490-495. For later cases, see Chicago Street Ry. Co. v. Rood, 163 Ill. 477; 54 Am. St. Rep. 478, and note; note to Long v. Pennsylvania R. R. Co., 30 Am. St. Rep. 736-738; Western Union Tel. Co. v. State, 82 Md. 293; 51 Am. St. Rep. 464, and note.

**NEGLIGENCE—NONSUIT IN ACTION FOR.**—Negligence is ordinarily a question of fact for the jury to determine from all the circumstances of the case; and the cases where a nonsuit is allowed are exceptional, and confined to those where the uncontradicted facts show the omission of acts which the law adjudges negligent; Durbin v. Oregon R. R. etc. Co., 17 Or. 5; 11 Am. St. Rep. 778.

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## DEMPSEY v. DOBSON.

[184 PENNSYLVANIA STATE, 588.]

**CUSTOM, WHEN UNREASONABLE AND THEREFORE VOID.**—A custom or usage prevailing in the business of carpet making by which the result of a color mixer's skill and labor in the service of his employer are recognized as belonging exclusively to the employé, is unreasonable, and therefore void.

**A CUSTOM CANNOT BE GOOD** unless it is reasonable.

**EMPLOYER AND EMPLOYÉ.**—Designs and recipes made by an employé are, as between him and his employer, the property of the latter for the purposes of his business. Though there is a patent issued to the employé for his formula, the right of the employer to continue its use in his business remains.

F. Carroll Brewster and George W. Harkins, for the appellant.

Richard P. White, for the appellees.

<sup>592</sup> WILLIAMS, J. This case was in this court in 1896, and is reported in *Dempsey v. Dobson*, 174 Pa. St. 122, 52 Am. St. Rep. 816. A verdict and judgment had been obtained in the court below against the defendants from which they appealed. We reversed the judgment, holding that a color mixer could not assert, as against his employer, an exclusive title to the various combinations and shades of color devised by him for use in the manufacture of carpets in his employers' mill. But we awarded a *venire facias de novo* because of an allegation that violence had been used by the defendants in the detention of the plaintiff, and in preventing him from carrying away from the mill his color books. A new trial has now been had. The charges of the use of unlawful violence do not seem to have been pressed, but the plaintiff attempted on the trial to prove a custom or usage prevailing in the business of carpet making, by which the results of the color mixer's skill and labor in the service of his <sup>593</sup> employer is recognized as belonging exclusively to the employé, the color mixer; the employer, the manufacturer, for whose use the colors were devised having no title whatever to them. The several assignments of error relate to the rejection of the evidence offered to establish such a custom. It is one of the requisites of a good custom that it must be reasonable. Another is, that it must not be contrary to law. The custom sought to be set up was an unreasonable one. The color mixer, like the designer and the weaver, is employed because of his supposed ability to serve his employer in the particular line of labor which he is expected to follow. First comes the work of the designer, who prepares, or invents, it may be, the pattern after which the carpet is to be made. Then comes the color mixer who is to mix his employer's colors, in such proportions as to produce the necessary shades required by the pattern that has been adopted. Finally comes the application of the colors and the weaving. The services of each and all these mechanics are requisite to the production of the carpet. The employer has an equal right to the faithful service of each, and is equally, so far as his own business is concerned, entitled to the results of the labor of each. If a color mixer could at his pleasure carry off the recipes and color books from his employers' factory and refuse to permit their further use except upon his own terms, it would be in his power to inflict enormous loss on the manufacturer at any moment, and not merely to disturb, but to destroy his business. Such a custom would not be reasonable and could not be sustained. But it is against the law.



The courts of the United States, of this state, and, so far as I have been able to examine, of all the states in the Union, recognize the rule laid down when this case was here in 1896, that "The designs and recipes so made for an employer are as between his employé and himself, his, for the purpose of his own manufacturing business. Even if his employé had obtained letters patent for his formula, protecting himself thereby against the public, still the employers' right to continue its use in his own business would be protected by the United States courts": *Solomons v. United States*, 137 U. S. 342. To the same effect are *Slemmer's Appeal*, 58 Pa. St. 155; 98 Am. Dec. 248; *Dempsey v. Dobson*, 174 Pa. St. 122; 52 Am. St. Rep. 816. The several offers made for the purpose of showing the existence of the alleged customs were properly rejected. In the absence of proof of the <sup>594</sup> alleged acts of violence, we fully concur with the learned judge of the court below that there was nothing shown by the evidence on the part of the plaintiff sufficient to sustain a verdict against the defendants, and that the case was a proper one for a compulsory nonsuit.

The judgment is affirmed, and judgment is now entered in favor of the defendants.

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**CUSTOM—VALIDITY OF.**—A usage to be binding must be of long standing, uniform in operation, just and reasonable, and known to and acquiesced in by all those whose rights are affected by it: *Hayward v. Middleton*, 3 McCord, 121; 15 Am. Dec. 615; *Steele v. McTyer*, 31 Ala. 667; 70 Am. Dec. 516, and note; *Jacobs v. Shorey*, 48 N. H. 100; 97 Am. Dec. 586. See monographic note to *Governor v. Withers*, 50 Am. Dec. 97-105, on customs and validity.

**MASTER AND SERVANT—RIGHT OF FORMER TO USE INVENTIONS OF LATTER.**—A master simply as such, in the absence of contract has no exclusive right to the inventions of his servant, but it is a rule of universal application that, if an employé, without any express agreement, uses the time, tools and money of his employer, with his consent, in making an invention, and then applies it practically in the employer's business, the law implies a license to the employer to continue to use the invention in his business, even after the relations between the employer and the inventor have been dissolved, although the employé has taken out a patent therefor: *Extended note to Dempsey v. Dobson*, 52 Am. St. Rep. 820, 821.

## BAILY v. PHILADELPHIA.

[184 PENNSYLVANIA STATE, 594.]

A MUNICIPAL CORPORATION in supplying its citizens with light in the streets and public places, acts under authority merely, and not under municipal obligation. Hence, a city may change its mode of action or cease to act, and the courts have no power to interfere, unless the proposed action contravenes some express statute or violates some binding contract.

A MUNICIPAL CORPORATION may lease gasworks owned by it, and which it has operated for the purpose of supplying its citizens and streets and other public places with light. Its power to make such a lease is not impaired by a statute creating a department of public works in cities of the class in question, and declaring that gasworks owned and controlled by a city and the supply and distribution of gas shall be under the control of such department.

MUNICIPAL CORPORATIONS.—Gasworks when owned by a city are held by it as a business corporation, and it may hence lease them to another corporation and give the latter the right to operate them for a period of years, and may stipulate to do nothing by ordinance or otherwise during that period to interfere with, limit, restrict, or impair the rights of the lessee.

CONTRACTS, OBLIGATION OF.—Where a loan is made to a city upon its general security, and without any pledge of its revenues, from gasworks or other specified source, the fact that the trustees of the gasworks are required to pay a certain per centum of the loan annually, to be put into the city treasury, which the city undertakes to apply to the payment of the interest on the loan, and to the creation of a sinking fund, does not entitle a bondholder to enjoin a lease of its gasworks by such city. These provisions respecting this per centum, and its retention and payment into the city treasury, do not constitute any part of the contract between the municipality and the bondholder.

Suit in equity to have a lease made by the city of Philadelphia of its gasworks declared illegal and void. The plaintiffs were residents of the city and owners of real and personal property and consumers of gas therein, and one of their number was also the holder of a certificate of loan issued by the city to procure moneys for the extension of its gasworks. The city in November, 1897, acting by its common council, passed an ordinance authorizing the execution of a contract with the United Gas Improvement Company whereby the city leased to it the gasworks, street mains, and other property, real and personal, used in connection with the manufacture and distribution of gas in the city. For more than sixty years prior to the enactment of this ordinance the city had owned its gasworks and controlled and operated them not only for public lighting, but for the supply and distribution of gas to its citizens and taxpayers. Under the ordinance of December 26, 1868, authorizing a loan and the issuing of bonds to obtain moneys with which

to maintain and extend the gasworks, it was provided that the trustees should semiannually in each year, until the loan was paid, retain out of the receipts for the sale of gas and other products of the gasworks the sum of four per cent of the amount of the loan, and pay that sum to the city treasurer, who should apply three per cent thereof to the payment of interest on the loan as it fell due, and the remainder to the commissioners of the sinking fund, to be used for the ultimate payment of the loan. The trial court refused to issue an injunction, and the plaintiffs appealed.

George Tucker Bispham, Joseph L. Caven, John G. Bell, and Peter Boyd, for the appellants.

James Alcorn, assistant city solicitor, John L. Kinsey, city solicitor, and Ernest Lowengrund, for the appellees.

602 MITCHELL, J. The gasworks are the property of the city of Philadelphia, not as a municipality, but as a business corporation. However much the idea that the city is not required by its municipal duty to supply its citizens with light in the streets and public places, may seem to fall below the modern conception of a city, it is beyond question on settled legal principles, that in the performance of that function the city acts under authority merely and not under municipal obligation. This was the rule of the common law, and no statute in reference to the city of Philadelphia has altered it. Hence the city may change its mode of action, or cease to act altogether, in its discretion, and the discretion is purely legislative. The courts have no power to interfere unless the proposed action contravenes some express statute, or violates some binding contract. These principles are elementary and need not be enlarged upon, since they are conceded by the learned counsel for appellants, and the corollary admitted that the lease now sought to be enjoined would have been clearly within the power of the city prior to the act of June 1, 1885 (Public Laws, 37), commonly known as the Bullitt Bill.

The argument of the appellants is arranged under three heads, and may be conveniently considered in that order.

First, that the ordinance for the lease of the gasworks is an 603 interference with the executive functions of the department of public works, and therefore within the prohibition of the act of June 1, 1885. Of that act this court has already declared that "the subject with which it deals is the administrative government of cities of the first class, and its manifest purpose was



to reform existing abuses in the executive department of the only city of that class": Commonwealth v. De Camp, 177 Pa. St. 112. The particular provisions of the act which are relied on by the appellants are: "There shall be the following executive departments: . . . . Department of public works": Act 1895, art. 1, sec. 1, "The department of public works shall be under the charge of one director who shall be the head thereof. Gasworks owned and controlled by the city, the supply and distribution of gas . . . . the lighting of streets, alleys, and highways . . . . shall be under the direction, control, and administration of the department of public works": Act 1895, art. 4, sec. 1. "Councils shall by general ordinances provide for the proper and efficient conduct of the affairs of the city by the mayor and several departments, and the boards thereof; but they shall not pass any ordinances directing or interfering with the exercise of the executive functions of the mayor and departments, boards or heads or officers thereof": Act 1895, art. 16. These provisions do not take away nor in any degree lessen any municipal authority previously lodged in the city, still less any merely business corporate power. They merely regulate the operation of its executive and legislative functions as to such public property of the enumerated classes as the city may at any time have. The prohibition to councils in article 16 is against interference with "the exercise of the executive functions" of the departments. The lease or sale of the gasworks is not an executive function. If it was it would belong to the director of public works as the head of the department. But no one would contend that the director has any power to make a sale or such a lease. That is a parting with the title and possession of the city, which can only be done by a legislative act. As a legislative act it is within the clear power of the city. The right to change the property which is the instrument through which the city exercises its powers, is inherent in its ownership, whether municipal or merely corporate, unless prohibited by contract or by the terms of a trust upon which it was acquired. But to avoid <sup>404</sup> all doubts the right of alienation is given in express words in the charter of 1789, all the powers granted in which were preserved by the consolidation act (Act, February 2, 1854, sec. 6, Public Laws, 25) and which appears to be still in force: Commonwealth v. Walton, 182 Pa. St. 373; 61 Am. St. Rep. 712. And the right is not taken away by the act of 1885, which, as already said, merely regulates the mode of exercise of executive, and incidentally of

legislative, functions without changing the rights which appertain to those functions.

But it is urged that although the city may sell and change the specific property, it cannot abdicate the function, and must therefore substitute other property through which its control and operation of the franchise may be continued, and the analogy is relied on of a trustee with a power to sell, who may by virtue thereof change the subject matter but cannot destroy the trust. This brings us back again to the preliminary question on which the whole case rests, whether supplying the public places and private citizens with gas for lighting purposes is a strictly municipal function, or merely a power conferred on the city as a corporation. If the former, it is a duty as well as a power, and cannot be abandoned; if the latter, it is an authority only and may be exercised or not at the city's option. Although the appellants start out with the concession that the lease in question would have been within the city's powers prior to the act of 1885, yet the elaborate and ingenious argument for them rests upon the contention that the lighting of the city, at least since that act, is a municipal duty, and though presented in different aspects and from different points of view, the argument constantly comes back to this contention, for without it there is confessedly no ground for the case to rest upon. But for reasons already stated, we are of opinion that the act of 1885 made no change in the city's municipal powers, either inherent or statutory, but merely regulated their exercise so far as related to executive officers, and incidentally to such purpose restrained what had become legislative usurpation. Under that act, so long as the city owns and operates the gasworks, it must do so through the department of public works, but there is no compulsion upon the city to continue the manufacture and sale of gas at all, or to do it through its own officers, if in its legislative judgment it is no longer expedient to do so.

**605** The second proposition of the appellants is that the ordinance assumes in respect to the public lighting to delegate a public legislative power, and in respect to the private lighting to confer a monopoly on the grantee, and in both cases to bind the discretion of councils for a long term of years. It is manifest that this proposition in the use of the phrase "public legislative power" comes back, as already indicated, to the contention that public lighting is a municipal duty. It is true that it is a legislative power, in the sense that it is the exercise of the will of the owner with respect to ownership of the property.

If such ownership was coupled with a municipal duty, such duty could not be escaped by lease or other form of delegation. But the gasworks, as already discussed, are held by the city as a business corporation. If the use of gas should be so far superseded as to make its manufacture and sale unprofitable, there is no compulsion on the city to continue it or to embark in any new venture for the supply of a different light. And if the management and operation of the works can be more profitably or more conveniently carried on by a lessee, instead of by the city's own immediate servants, the city in making a lease is determining a business question in its legislative corporate capacity, just as any private corporation might do, but is not delegating any municipal power, legislative or other, which involves municipal duty.

In regard to the conferring of a monopoly, the appellants cite the provision in the lease that "the city of Philadelphia agrees that during the term of this contract it will do nothing by ordinance or otherwise which will in any way interfere with, or limit, restrict, or imperil this exclusive right hereby vested in the said United Gas Improvement Company, its successors or assigns," and claim that this creates a monopoly which is void on the ground of public policy. To this objection it would be a sufficient answer that, as already held, the city in this matter is acting in its business, not its governmental, capacity, and the owner of business property, even though a municipal corporation, may in dealing with it make such terms as in its discretion it deems best for its interest. When the owner of a business sells it with its goodwill, etc., he may agree as part of the consideration to the purchaser, not to go into the same business again as a rival, within an agreed territory or for an agreed time. The city of <sup>606</sup> Philadelphia selling its gas-making plant and goodwill may do the same thing. But in the provision of the lease now under consideration the city does not assume to grant any franchise. It could not do so if it would. What the city does is to covenant that it will do no act in derogation of the right of the lessee under the grant to operate the gasworks and supply the city and the citizens with light therefrom. The franchise of the lessee to furnish light is not derived from the city, but from the legislature, and whether it is exclusive or not at present, or shall be exclusive or not in the future, does not and will not depend on the city, but on the legislature. All that the city does is to agree that it will do no act itself whereby the privileges granted by it to the lessee, and intended to



be exclusive so far as it is concerned, shall be limited or interfered with. This was clearly within its powers in dealing with its business property. Whether the legislature may hereafter impose upon the city a municipal duty in regard to lighting which may conflict with its present contract is a question we need not consider until the case shall arise with proper parties in interest to such a question.

It is further argued that the lease undertakes to bind the discretion of councils for a long term of years. This again comes back to the contention that lighting the city is a strictly municipal or governmental function, as to which councils cannot bind their successors. But, as already held, the city is acting in its business capacity only, and the contract binds it in that capacity. All contracts which contemplate things to be done after the immediate present must, to that extent, bind and limit the power of the contracting party. This principle has already been adjudicated in its application to the city of Philadelphia and the gasworks in the cases of the *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. St. 175, 185, 72 Am. Dec. 730, and *Wheeler v. Philadelphia*, 77 Pa. St. 338.

The last proposition of the appellants is that the ordinance impairs the obligation of the city's contract with certain holders of its bonds. This was the ground of decision in *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. St. 175, 185; 72 Am. Dec. 730. But the cases are not at all alike in the facts. In *Western Sav. Fund Soc. v. Philadelphia*, the ordinance of 1841 distinctly pledged the revenues of the gasworks to the creditors for security of payment of the bonds, and provided <sup>607</sup> for the management by trustees for that purpose. The ordinance of 1868, under which Mr. Campbell, one of the complainants, is a bondholder, has no such provision. The loan was made to the city, and upon the city's general credit, without any pledge of its revenues from the gasworks or any other specified source. On the contrary, the ordinance gave express notice in section 4, that the terms and provisions of the ordinance of 1841 should not apply in any way to this loan. Section 3 of the ordinance requires the retention by the trustees of the gasworks of a certain per cent of the amount of the loan, annually, and its payment into the city treasury, whereupon the city undertakes to apply part of it to the payment of the interest on the loan and to pay the other part into the sinking fund. These provisions are not part of the contract between the city and the loanholders, but are terms imposed by the city on the trustees of the

gasworks as conditions on which the city will raise the money for the latter's use. Without these terms the city would have had to meet the bonds at their maturity out of general taxation, and could not have looked for repayment from the revenues of the gasworks unless at the option of the trustees. By these terms the city guarded itself from this risk, and secured repayment to itself from the revenues of the department for whose use it had borrowed the money. But the requirements of this section were for the protection of the city only and involved no pledge to the loanholders. They loaned on the general credit of the city, and perhaps also on the faith of the sinking fund pledged for the payment of this and other loans. But there is no averment that the sinking fund has not been kept up by appropriation from the city treasury from time to time as required by law. Without such averment and proof it does not appear that any obligation of the loanholder's contract has been impaired.

None of the grounds on which the court is asked to interfere can be sustained, and the injunction was rightly refused.

Decree affirmed at costs of appellants.

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**MUNICIPAL CORPORATIONS — POWERS — MANAGEMENT OF MUNICIPAL PROPERTY—GASWORKS.**—A municipal corporation has two kinds of powers; one governmental and public, as to which it is clothed with sovereignty, and the other private, as to which it is merely a corporate legal individual: *Lloyd v. Mayor*, 5 N. Y. 369; 55 Am. Dec. 347. When a power relates to the accomplishment of private corporate purposes in which the public is concerned but indirectly, it is private in its nature; and a municipality in respect to its exercise is regarded as a legal individual: *Springfield Fire etc. Ins. Co. v. Keeseville*, 148 N. Y. 46; 51 Am. St. Rep. 667. If a city has property or engages in an undertaking the object of which is profit to itself, its liability with respect to such property or business is the same as if it were a private corporation: Monographic note to *Goddard v. Harpswell*, 30 Am. St. Rep. 402. Waterworks owned and held by a city is charged with a public trust: *Huron Waterworks Co. v. Huron*, 7 S. Dak. 9; 58 Am. St. Rep. 817. See *Fort Wayne v. Lake Shore etc. Ry. Co.*, 132 Ind. 558; 32 Am. St. Rep. 277, and note. Municipal corporation acts as a private corporation when it enters into contracts with its inhabitants, as to supply gas, and is subject to the same duties, liabilities, and disabilities as individuals: *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. St. 175; 72 Am. Dec. 730.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**TENNESSEE.**

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**REMBERT v. EDMONDSON.**

[99 TENNESSEE, 15.]

**STATUTE OF LIMITATIONS—UNITING ADVERSE POSSESSIONS BY ORAL CONTRACT.**—If one in possession of real property without title sells his interest and delivers possession to another, though without any written contract, the purchaser may rely upon the prior adverse possession of his vendor to make out the time necessary to perfect his prescriptive title.

E. Levy, for the appellant.

John P. Edmondson, for the respondent.

**15** McALISTER, J. This is an action of ejectment to recover possession of a small strip of land fronting six feet on Talbot street, in the city of Memphis, and running back fifty feet. The chancellor decreed in favor of the defendant, Edmondson. Complainant appealed, and has assigned errors.

**16** The strip in controversy was part of a lot, seventy-five by one hundred feet, bought in 1859 by Mrs. Rembert, the ancestor of complainants. Mrs. Rembert subdivided her lot, and on the 5th of February, 1866, sold and conveyed to Mrs. Julia Heppeck fifty by ninety-four feet, thus leaving six feet by fifty feet in the rear of the lot, which Mrs. Rembert designated as an alley. Shortly thereafter, Mrs. Rembert sold the remaining twenty-five feet of her original purchase to Julia Mason, describing this lot as fronting twenty-five feet and running back one hundred feet. On the 17th of January, 1891, Julia Mason sold and conveyed her twenty-five feet purchased from Mrs. Rembert to Julia Heppeck, and in her deed this clause appears,



to wit: "With the right to an alley six feet wide to Talbot street, along the west line of Julia Heppeck's lot."

It will thus be seen that Mrs. Heppeck had acquired and held possession of the entire lot owned by Mrs. Rembert, ancestor of complainants, prior to 1866, including the six feet by fifty feet designated and known as an alley. Mrs. Heppeck died in 1887, leaving brothers and sisters as her heirs at law. On April 20, 1881, and March 30, 1883, these brothers and sisters joined in deeds conveying their interests to one Sarah Levy, who was also a sister of Mrs. Heppeck. These deeds were warranty deeds, and conveyed title to seventy-five by one hundred feet, which included the strip in controversy. In these deeds no mention was made of this strip as an <sup>17</sup> alley, and the record shows that prior to this time the use of the strip as an alley had been abandoned, and was under inclosure.

It further appears that in March, 1887, Mrs. Levy sold and conveyed to Mrs. John P. Edmondson the lot on the corner of Main and Talbot streets, but described it as fronting fifty feet on Main street and running back ninety-four feet. It appears from the record that this trade was negotiated by David Gensberger, brother of Mrs. Levy, and by James F. Graham, who represented his sister, Mrs. Edmondson, at that time Miss Graham. It appears that at the time of this trade the strip of six feet in controversy was the subject of negotiation between the respective agents of the owners. In this interview Gensberger represented that his sister, Mrs. Gensberger, had title to fifty by ninety-four feet, but that one hundred feet were within the inclosure; that his sister had no title to the six feet, but had the use of it, and had had it inclosed for a number of years; and that while Mrs. Levy would not make a title to the six feet, that whatever interest she had in the six feet by right of possession went with the property. At the time Miss Graham purchased, the strip in controversy was under inclosure with the lot, and when Miss Graham was put in possession of the lot fifty by ninety-four feet, she was also put in possession of the strip six by fifty feet. It will thus be seen that Miss Graham acquired no title by the deed to the six feet in controversy. As already stated, <sup>18</sup> it was not embraced in the deed, although it was inside of the inclosure.

It further appears that at the date of the filing of this bill Miss Graham had not been in possession of the strip for seven years, so as to acquire a possessory right under the second section of the act of 1819. If, however, she is permitted to con-

nect her possession with that of her vendor, Mrs. Sarah Levy, her possessory right is fully made out.

In the case of *Marr v. Gilliam*, 1 Cold. 491, this court held, viz.: "Separate successive disseisins do not aid one another where several persons successively enter on land as disseisors, without any conveyance from one to another, or any privity of estate between them other than that derived from the mere possession of the estate. Their several consecutive possessions cannot be tacked on so as to make a continuity of disseisins of sufficient length of time to bar the true owners of their right of entry."

In the later case of *Erck v. Church*, 87 Tenn. 575, this court, in a very able opinion by Judge Dickinson, reaffirmed the rule, and held, viz.: "There must be a privity of estate connecting the successive possessions, and a transfer of the possessory right, by grant, inheritance, devise, or contract, verbal or written." The court approves the rule on this subject laid down in *Wait's Actions and Defenses*, viz.: "Where there are several successive adverse occupants of real property, the last one may tack the <sup>19</sup> possession of his predecessor to his so as to make a continuous adverse possession for the time required by the statute, provided there is a privity of possession between such occupants, and in case of an actual adverse possession, such privity arises from a parol bargain and sale of the possession of the premises, followed by delivery thereof, as well as by a formal conveyance from one occupant to another."

We think these principles are conclusive of this case. The verbal contract between Mr. Gensberger, the agent of Mrs. Levy, and James F. Graham, the agent of Miss Graham, at the time the trade for the lot was concluded, that whatever possession Mrs. Levy had of the six foot strip should go with the lot, established such a privity of possession, in respect to this strip, between Miss Graham and her vendor, Mrs. Levy, as that their successive possessions may be connected so as to make out the bar of the statute.

The decree of the chancellor is affirmed.

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**ADVERSE POSSESSION—TACKING POSSESSIONS.**—The tacking of successive possession is now very generally recognized as permissible to raise a title by adverse possession and enjoyment, as will be seen by reference to some of the modern authorities. But to create a title by uniting several possessions, it is established by all the decisions that there must be privity of estates, or the several titles must be connected: Extended note to *Innis v. Miller*, 13 Am. Dec. 332. The privity necessary is, that the latter holder must

take under the earlier, as by descent, by will, by grant, or by voluntary transfer of possession: Ramsey v. Glenny, 45 Minn. 401; 22 Am. St. Rep. 736, and note; Alexander v. Gibbon, 118 N. C. 796; 54 Am. St. Rep. 757. The possession of land by virtue of a verbal contract of sale, is the possession of the vendor; but after conveyance the vendee may take advantage of such possession, in order to establish adverse possession: Valentine v. Cooley, Meigs, 613; 33 Am. Dec. 166.

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## HILL v. HATCH.

[99 TENNESSEE, 39.]

**EXECUTIONS—LEVY UPON PROPERTY IN THE CUSTODY OF THE LAW.**—When an officer of the law, acting under police rules or without them, takes from his prisoner personal property either for safekeeping or to remove from his control that which he might use in effecting his escape, it is not subject to seizure under civil process. It is not necessary to the application of the rule that the property in question should be connected with a criminal charge.

Casselberry & Martin, for Hill.

Bell & Horn, for Hatch.

<sup>39</sup> BEARD, J. In this case, an attachment issued at the instance of plaintiff in error against the defendant in error, was levied by service of garnishment on certain members of the police force of Memphis. At the time of the service the defendant in error was in their custody, under arrest, upon a <sup>40</sup> criminal charge which had been preferred against him. Upon his arrest, these officers, whether of their own motion or under the police regulations of that city does not appear, removed from the person of the defendant in error, or required him to remove and deliver to them, certain articles of personal property of considerable value. This property was in no way connected with the charge under which his arrest was made, and it was this which the garnisheeing creditors sought to impound. These facts were pleaded in abatement of the writ. Upon the trial the circuit judge sustained the plea and dismissed the attachment. His action in this respect is assigned for error in this appeal.

The question presented by this record has received the attention of a number of courts of this country, and, with regard to it, there has been some diversity of judicial opinion. We are satisfied, however, that the better policy, as well as the weight of authority, is with the ruling of the trial judge. In disposing of it, we do not deem it necessary to determine the right of a police officer, upon arresting a prisoner, of his own motion, to



take from him articles of value, or the reasonableness of municipal regulations which may authorize this to be done. It may be conceded, for our present purpose, that in either case this may be done, and that a wise precaution requires that it should be done. But when an officer of the law, acting under police rules or without them, takes from his prisoner personal property, <sup>41</sup> either for its safekeeping or to remove from his control that which he might use in effecting escape, a sound public policy, we think, requires that, for the time, it should be safe from seizure by civil process. We speak now of such property as is in no respect connected with the criminal charge. It would be a dangerous temptation to eager, and sometimes unscrupulous, creditors to resort to the machinery of the criminal courts against their reluctant debtors, if it were once understood that whatever of value was taken from the person of the party arrested by the officer having him in charge, could be at once impounded by the levy of an execution or attachment. Such a practice, we are sure, would likely be productive of results oppressive to the individual and shocking to the moral sense of the community. In support of this conclusion, we refer to *Commercial Ex. Bank v. McLeod*, 65 Iowa, 665; 54 Am. Rep. 36; *Richardson v. Anderson*, Tex. Civ. App., Jan. 20, 1890; *Dahms v. Sears*, 13 Or. 47; *Robinson v. Howard*, 7 Cush. 257; *Morris v. Penniman*, 14 Gray, 220; 74 Am. Dec. 675.

The opposite view of this question has been taken by the supreme court of New Hampshire, and presented with great force in *Closson v. Morrison*, 47 N. H. 482; 93 Am. Dec. 459. After a careful examination, we are satisfied that the sounder policy is announced in the cases cited as authority for our conclusion.

Judgment affirmed.

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**EXECUTION—PROPERTY IN CUSTODY OF LAW.**—It is very clear that all property in custody of the law is not subject to any seizure or interference by officers acting under writs of execution; but some difficulty may be experienced in determining when property is so within the custody of the law as to be shielded by this rule: Note to *Walling v. Miller*, 2 Am. St. Rep. 403; *Hackley v. Swigert*, 5 B. Mon. 86; 41 Am. Dec. 256. Custody of law is such custody only as an officer has a right to assume over specific property by virtue of law, or by virtue of the mandate contained in his writ: *Gilman v. Williams*, 7 Wis. 329; 76 Am. Dec. 219. See note to *Hardy v. Tilton*, 28 Am. Rep. 35, 36. As to property in the hands of an officer who took it from a prisoner the cases are not in accord as to whether it is subject to attachment or execution: *Ex parte Hurn*, 92 Ala. 102; 25 Am. St. Rep. 23, and note; *Morris v. Penniman*, 14 Gray, 220; 74 Am. Dec. 675, and note. The better rule is adhered to in the principal case: *Freeman on Executions*, 2d ed., sec. 130 a.

## STYLES v. HARRISON.

[99 TENNESSEE, 128.]

A JUDGMENT RENDERED ON SUNDAY is not erroneous merely; it is void.

William Fitzgerald, for Styles.

J. S. Duvall, for Harrison.

<sup>128</sup> BEARD, J. The only question in this case is, Is a judgment rendered on Sunday in one of the courts of this state valid?

It was a maxim of the common law that dies dominicus non est dies juridicus: Broom's Legal Maxims, 21; Swann v. Broome, 3 Burr. 1595. Accordingly, no valid judgment can be rendered on Sunday: 1 Black <sup>129</sup> on Judgments, sec. 182; 1 Freeman on Judgments, 138; 24 Am. & Eng. Ency. of Law, 577; Ex parte White, 15 Nev. 146; 37 Am. Rep. 466. The cases all show that such a judgment is not simply erroneous, but is absolutely void: 1 Black on Judgments, sec. 182; Houghtaling v. Osborn, 15 Johns. 119; Arthur v. Mosby, 2 Bibb, 589; Davis v. Fish, 1 G. Greene, 406; 48 Am. Dec. 391; Blood v. Bates, 31 Vt. 147; Chapman v. State, 5 Blackf. 111.

While now, for the first time, the question here considered has directly arisen in this state, yet, in the opinion of this court in Elrod v. Gray Lumber Co., 92 Tenn. 476, in distinguishing the statute under consideration in that case from a somewhat similar statute construed by the supreme court of Wisconsin, in Lampe v. Manning, 38 Wis. 673, this court clearly indicated its opinion that Sunday was dies non juridicus.

It follows that the circuit judge was right in discharging from confinement the petitioners, who were illegally restrained of their liberty in the county workhouse, for the nonpayment of fines adjudged against them on Sunday, for alleged commission of certain misdemeanors, and his judgment is affirmed.

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JUDGMENT RENDERED ON SUNDAY.—The verdict of the jury may be received on Sunday, but a judgment rendered on that day is void, and cannot be enforced or sustained: Parsons v. Lindsay, 41 Kan. 336; 13 Am. St. Rep. 290; Shearman v. State, 1 Tex. Civ. App. 215; 28 Am. Rep. 402. A criminal judgment of a justice of the peace rendered on Sunday is void: Ex parte White, 15 Nev. 146; 37 Am. Rep. 466; note to Coleman v. Henderson, 12 Am. Dec. 291.

## MEMPHIS BARREL AND HEADING COMPANY v. WARD.

[99 TENNESSEE, 172.]

**CORPORATIONS—EXECUTIONS AGAINST INSOLVENT, NO PREFERENCE CAN BE GAINED BY.**—The levy of an execution upon the property of an insolvent corporation after it has suspended business and moved to file a bill in equity for the distribution of its assets, does not create any preference in favor of the judgment creditor over other creditors who have not obtained any judgment nor levied any writ.

**CORPORATION—TRUST FUNDS.**—The assets of an insolvent corporation become, from the date of its assured insolvency, a trust fund for equal distribution among its creditors. Afterward none of them can obtain priority by recovering a judgment and levying an execution against the corporation.

Perkins & Watson, for Barrel & Heading Company.

Scruggs & Henderson, for Ward.

<sup>172</sup> McALISTER, J. The question presented for determination upon this record is whether the Memphis <sup>173</sup> City Bank, by virtue of a judgment recovered before a justice of the peace, and the levy of an execution upon certain property belonging to the Memphis Barrel & Heading Company—an insolvent corporation—is entitled thereby to priority of satisfaction out of its assets.

The facts necessary to be stated are that, on October 21, 1895, the Memphis City Bank recovered a judgment before a justice of the peace against the Memphis Barrel & Heading Company for the sum of seven hundred and fifty-two dollars. Affidavit was made that the company was about fraudulently to dispose of its property, and thereupon an instant execution issued and was levied upon certain personal property belonging to said insolvent corporation.

This levy was made at 11:15, October 21, 1895. On the same day, and at 12:10, the Memphis Barrel & Heading Company filed its bill in the chancery court of Shelby county, alleging its insolvency, and praying that its affairs might be administered and its assets distributed among its creditors, under the orders of said court. This bill recited that on the morning of October 21, 1895, the directors of the Memphis Barrel & Heading Company adopted a resolution declaring that said corporation was insolvent and unable to further carry on its business, and authorizing the president of the company to file a bill in the name of the company in the chancery court for the settlement of its affairs as an insolvent corporation.

<sup>174</sup> It will be observed that, about one hour before the com-



pany filed its insolvent bill, the Memphis City Bank had recovered its judgment, and had caused an execution to be levied upon the property of the company. The Memphis Barrel & Heading Company sought, by supplemental proceedings, to annul this judgment and vacate the levy, upon the ground that, at the time of said judgment and levy, said corporation was insolvent and its assets had become a trust fund for the benefit of all its creditors.

The chancellor, upon final hearing, adjudged that the Memphis City Bank, by reason of the levy of its instant execution, had acquired a priority of satisfaction over the other creditors of the Memphis Barrel & Heading Company, out of the property impounded by its execution.

The record shows that prior to October 17, 1895, the complainant corporation was engaged in the manufacture of barrels, kegs, boxes, etc., in the city of Memphis. On said date the secretary, treasurer, and general manager of the company, after flooding the business community with worthless commercial paper, absconded and fled to Honduras. An examination into the affairs of the company revealed the fact that it was irretrievably insolvent, and on October 18, 1895, the mill was shut down with a view of permanent suspension and a final liquidation of the affairs of the company. Ward, says one witness, was the general manager and financial head of the concern, and when he went, the concern practically <sup>175</sup> went with him. On the morning of October 21, 1895, the directors of the company assembled and adopted the following resolution, to wit:

"Whereas, the Memphis Barrel & Heading Company is unable to meet its pressing liabilities, and is, in the opinion of the directors, now insolvent, and unable to further carry on its business, it is resolved that the president of said company be, and he is hereby, authorized to file a bill, in the name of said company, in the chancery court of Shelby county, Tennessee, to administer the assets of said corporation."

In pursuance of said resolution and at 12:10 on said October 21, 1895, a general creditors' bill was filed in behalf of said corporation, which was sustained by the chancellor, and a receiver appointed to take charge of its assets. On the same day, to wit, October 21, 1895, the Memphis City Bank recovered a judgment before a justice of the peace against said Memphis Barrel & Heading Company for the sum of seven hundred and fifty-two dollars, and at 11:15 upon affidavit filed that the company was about, fraudulently, to dispose of its property, an instant

execution issued, which was levied on certain personal assets of the corporation. A petition was thereupon filed by the Memphis Barrel & Heading Company in said cause, reciting the facts just mentioned, whereupon the Memphis City Bank was enjoined <sup>176</sup> from further proceeding under the levy of its instanter execution.

The first assignment of error is that, under the facts and circumstances of this case, the chancellor erred in adjudging that the Memphis City Bank acquired any prior right to said assets by reason of the levy of said instanter execution. We are of opinion this assignment of error is well made. The facts disclosed in this record demonstrate that when the Memphis City Bank sought by instanter execution to impound a portion of the assets, the company was not a going concern, but was hopelessly insolvent and had permanently ceased to do business. As stated by Mr. Wellford, vice-president of the company, "that, by the flight of A. K. Ward, secretary, treasurer, and general manager, said corporation was left helpless and inanimate, unable to transact any business whatever, having neither money nor credit by which, it might prosecute further operations; that, from October 18, 1895, there had been a complete cessation of business, which said cessation is and was regarded, prior to October 21, 1895, necessarily permanent; that all orders received by said company subsequent to Ward's departure were refused on account of the corporation's total inability to continue operations as aforesaid."

The settled law of this state is that the assets of an insolvent corporation become, from the date of its assured insolvency, a fixed trust fund for equal pro rata distribution among its creditors, unless <sup>177</sup> otherwise provided by law or fixed by valid contract: *Marr v. Bank*, 4 Cold. 471; *Moseby v. Williamson*, 5 Heisk. 278; *Comfort v. Patterson*, 2 Lea, 671. There must, however, be some positive act of insolvency, such as the filing of a bill to administer its assets, or the making of a general assignment, or a permanent cessation to do business: *Comfort v. McTeer*, 7 Lea, 660.

In *Tradesman Pub. Co. v. Car Wheel Co.*, 95 Tenn. 634, 49 Am. St. Rep. 943, we held "that the execution of trust deeds by a corporation, conveying all its property to trustees, was a confession of insolvency, and ipso facto converted its assets into a trust fund for the benefit of all its creditors." And again, in *McClaren v. Roller Mill Co.*, 95 Tenn. 696, we held, viz.: "The general principle is well settled that the property of a private

corporation is not charged by law with any direct trust or specific lien in favor of general creditors, and such a corporation, so long as it is in the active exercise of its functions, may exercise as full dominion and control over its property as an individual. So a creditor, while the corporation is a going concern, although actually insolvent, is entitled to pursue the ordinary legal or equitable remedies for the enforcement of his claim. But when a corporation is dissolved, or determines to discontinue the prosecution of its business, or makes a general assignment, or commits any other overt act indicative of positive and assured insolvency, its property is thereafter affected by an equitable <sup>178</sup> lien or trust for the benefit of all its creditors, and individual creditors may be restrained, by injunction, against the appropriation of corporate assets to the payment of their claims": *Smith v. Bradt Printing Co.*, 97 Tenn. 351.

So, in the case of *Marr v. Union Bank*, 4 Cold. 485, Judge Milligan, delivering the opinion of the court, said that "after the admitted insolvency of the bank, and the nonuser of its franchises, the officers or agents of the corporation, in whose hands the assets remained, held them as quasi-trustees for the creditors," etc. "A single creditor," continues the court, "would, by no pretended legal technicality, be allowed to apply the fund or appropriate it all to his benefit, and thereby totally defeat all the others": See, also, *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 86 Tex. 165; *Corey v. Wadsworth*, 99 Ala. 68; 42 Am. St. Rep. 29.

As already stated, the Memphis Barrel & Heading Company was, on October 18, 1895, hopelessly insolvent, and had no reasonable expectation of redeeming its fortunes. It therefore suspended business, and refused to accept orders or otherwise exercise its functions, and thereafter, on the morning of October 21st its directors assembled, and, by resolution, solemnly declared its insolvency and inability to further carry on its business, and instructed its president to cause to be filed in the chancery court a general creditor's bill for the administration of its affairs and distribution of its assets. We think it very plain, <sup>179</sup> under the authorities, that from this time the assets of said insolvent corporation became a trust fund for the benefit of all its creditors, and that no one creditor was entitled to priority of satisfaction of his claim out of the corporate assets, notwithstanding his effort to fix a lien by the levy of his execution. The general rule is well settled that no lien by attachment, execution, or other



legal process, can be obtained upon trust property, except subject to existing equities.

The case of *Bank v. Lumber etc. Co.*, 91 Tenn. 13, relied on by counsel for the bank, is not applicable in this case, for the reason that the creditor in that case had sued out his attachment and fixed a lien on the property before the corporation had ceased to transact business, and prior to the commission of any overt act indicative of positive or assured insolvency. In that case it appeared that the attachment was levied two weeks before the company made a general assignment. The court remarked: "There was no stop, no suspension of business, no closing of doors. On the contrary, there was no lack of active operations on the part of the company, and its officers were hopeful of success."

The decree of the chancellor is therefore reversed, the levy of the execution in favor of the Memphis City Bank upon the assets of complainant company is vacated, and the bank is perpetually enjoined against the enforcement of said levy. The bank will pay the costs of the appeal.

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**CORPORATIONS—INSOLVENT—ASSETS AS TRUST FUND—PREFERENCE OF CREDITORS.**—The authorities are divided on the question as to whether the assets of an insolvent corporation are a trust fund for the benefit of corporation creditors: Note to *Sabin v. Columbia Fuel Co.*, 42 Am. St. Rep. 767. The doctrine that the entire property of an insolvent corporation constitutes a trust fund which must be administered by the directors for the proportionate benefit of all creditors, without preference, can apply, if at all, only when that point is reached in the affairs of the corporation where its managers find themselves obliged to deal with its assets in view of a suspension: Monographic note to *Buck v. Ross*, 57 Am. St. Rep. 77. See *Butler v. Harrison Land etc. Co.*, 139 Mo. 467; 61 Am. St. Rep. 464; *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205; 54 Am. St. Rep. 31, and notes.

**CORPORATIONS—INSOLVENT—PREFERENCE OF CREDITORS.**—The assets of an insolvent corporation are not a trust fund, and creditors may secure preferences therein by obtaining liens by judgment or otherwise: *Sweeney v. Grape Sugar Co.*, 30 W. Va. 443; 8 Am. St. Rep. 88. Contra, *Morgan v. New York R. R. Co.*, 10 Paige, 290; 40 Am. Dec. 244, and note.

## BANK v. LOONEY.

[99 TENNESSEE, 278.]

**SALES—FRAUDS OF THIRD PERSON.**—One induced to purchase property by misrepresentations made by third persons other than the vendor, and for whose acts the vendor is not responsible, is bound by his purchase, and cannot avoid notes given by him for the purchase price.

**NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER, WHO IS.**—One who purchases a negotiable instrument before maturity, paying therefor by surrendering notes and securities held by him against third persons, is a bona fide holder for value and entitled to protection as such.

A **NEGOTIABLE INSTRUMENT** made in favor of A B, trustee, is none the less negotiable, and a purchaser thereof from the trustee is not charged with, nor subject to, equities existing in favor of the makers when the trustee, in disposing of the note, did not act in contravention of his trust.

**NEGOTIABLE INSTRUMENTS.—THE FACT THAT THE WORD "TRUSTEE"** is on the face of securities, cannot put the purchaser to any inquiry beyond ascertaining whether the trustee has power to sell or otherwise dispose of them.

**NEGOTIABLE INSTRUMENT—TRUSTEE'S LIABILITY AS INDORSER.**—If a negotiable instrument is issued to A B, trustee, and he subsequently indorses it, he is personally liable upon his indorsement.

A **NEGOTIABLE INSTRUMENT IS NOT SATISFIED**, nor the liability of the maker or his indorser waived or extinguished, by an agreement between the holder and the second indorser by which he was released from liability on his indorsement, certain securities being substituted in place of such liability.

**NEGOTIABLE INSTRUMENTS—ACCOMMODATION INDORSER.**—An indorser is not relieved from liability by the fact that the purchaser or indorser of the note had knowledge that such indorser had no interest in the transaction.

W. H. Ruffin and W. B. Glisson, for Bank.

Thomas M. Scruggs, William M. Randolph & Sons, and A. S. Buchanan, for Looney.

<sup>279</sup> **BEARD, J.** The complainant, being the owner of a twelve thousand five hundred dollar note, one of two notes of like amount executed by R. F. Looney to the order of J. P. Sykes, trustee, and by him and the Sheffield City Company indorsed to complainant, filed this bill, seeking a decree for the amount of this note and <sup>280</sup> interest, and also for a foreclosure of a trust deed made to secure it. The bill alleges that this trust deed was executed by Looney and wife on certain real property belonging to the wife, in or near Memphis, and that the property was already, in part or in whole, covered by two other trust deeds; that J. P. Sykes, the indorser of this note, was also trustee in the trust deed, and that though complainant's note was long past due, and full power of sale on such

contingency was granted to the trustee, yet he declined to execute this power. Sykes, as indorser and as such trustee, Looney and wife, the trustees and beneficiaries in the other two trust deeds, and the United States National Bank, as the alleged holder of the other of these notes, were made parties to this bill. The claim of complainant not being before us, we need not pursue it further.

The United States National Bank filed an answer to the original bill, and made its answer a cross-bill, in which it asked affirmative relief. In this answer and cross-bill it was averred that the United States National Bank was the holder of the other of these two notes of twelve thousand five hundred dollars, having acquired title thereto, bona fide, for a valuable consideration, before maturity and in due course of trade; that this note was also made payable to J. P. Sykes, trustee, that it was by him and the Sheffield City Company indorsed, and that at maturity it was duly protested for nonpayment, of all of which the indorser had legal notice. The cross-bill prayed that the trust <sup>281</sup> deed described in the original bill be foreclosed, and the proceeds of the foreclosure sale be applied to the payment of this note. To this cross-bill Looney and wife and J. P. Sykes filed answers. In their answer Looney and wife denied that the United States National Bank acquired this note in due course of trade, for value, and without notice of the makers' equitable defenses against it, and they aver that the note and trust deed to secure it were procured by fraud, and that no valuable consideration passed to them for the same. The fraud complained of, and as set out in the answer, is as follows: In July, 1892, and for some time before, there existed, at Sheffield, Alabama, a corporation called the "Sheffield Land, Iron & Coal Company," which was the owner of various properties, real and personal. The operations of this corporation seem to have become embarrassed by heavy debts, the burden of which was largely carried by some of its stockholders. Certain of these parties about that time conceived the idea of relieving themselves of this burden by organizing a syndicate to purchase the assets of the corporation, and to this end they solicited a subscription from R. F. Looney, and perhaps others, and, in order that the parties so solicited might understand the character of the assets, there was prepared a statement or schedule of the same, together with extensions showing their value. In this paper, these assets were set down as worth one million twelve thousand six hundred and seventy-six dollars and eighty-one



cents, and it is alleged that representations were made to Looney <sup>282</sup> in this paper, and otherwise by these gentlemen, that these values were in no sense speculative, but that they were real.

In the answer it is also stated that it was in the same way represented that three hundred thousand dollars would pay all the debts of the corporation, and that all the assets so scheduled would be turned over to the syndicate, unencumbered, save for the burden of a bonded debt of sixty thousand dollars, resting on the hotel in Sheffield, and scheduled as part of these assets, which was to be taken care of by the syndicate, but that it was at the same time stated to him that the rents derived from the hotel property would be sufficient to pay the interests on these bonds. Relying on their statements, the answer avers that R. F. Looney subscribed for a share of fifty thousand dollars of and in the syndicate which was organized to purchase these assets at the sum of three hundred thousand dollars. The answer alleges that he was imposed upon greatly as to the value of these properties; that instead of being worth over a million of dollars, they were worth greatly less, and instead of being unencumbered, save in the single particular referred to, they were, in numerous instances, and to their full value, hypothecated to the creditors of this corporation. The answer also alleges that the debts much exceeded three hundred thousand dollars. It is unnecessary to enter further into the details of the misrepresentations of which he alleges he was made the victim, it being sufficient to say that they were numerous and very great.

<sup>283</sup> It is further stated in the answer that by his subscription of fifty thousand dollars to the capital of the syndicate, Looney was to be interested in the assets purchased in the proportion that this sum bore to the full amount of three hundred thousand dollars, and that to pay this subscription he executed his notes for fifty thousand dollars, including the two notes of twelve thousand five hundred dollars each, secured by the trust deed in question. Looney and wife also filed a cross-bill, in which they seek to have the notes delivered up for cancellation and to have the trust deed removed as a cloud on Mrs. Looney's title. Sykes also answers the cross-bill and denies his liability as indorser, and avers that the United States National Bank took the note with full knowledge that his purpose in indorsing the note was simply to pass title, and in no respect to bind himself personally on it. The United States National Bank answered the cross-bill of Looney and wife, denying its averment, so far as they impeached its title to the note sued on, and it

reiterated that it was the bona fide holder of this paper. Subsequently amended answers were filed by Looney and Sykes, in which they alleged that since the filing of their original answer they had ascertained that this note had been paid to the holder, the United States National Bank, and that it had no right to prosecute further its suit upon it; that the debt of the bank was originally a debt due from the Sheffield Land & Iron Company, and that this debt was assumed by the Sheffield City Company when it was organized; that <sup>284</sup> this note, together with the other notes of Looney, heretofore described, were obtained by the false representations of the promoters of the Sheffield City Company, and that the note sued on by the United States National Bank was transferred to it in settlement of the debt of the Sheffield Land & Iron Company, which it had assumed; and that subsequently that bank had made an arrangement with the Sheffield City Company, as a result of which the note was fully discharged.

Upon the hearing, after much proof was taken, the chancellor dismissed the cross-bill of the United States National Bank, and, upon the cross-bill of Looney, ordered the note to be canceled, as well as the deed of trust securing it. From this portion of the decree the bank has prosecuted its appeal to this court.

The first question that will be considered is: Do the facts disclosed in the record afford a defense against the note in the hands of the bank, even if it be conceded it does not occupy the position of a bona fide holder for value? That Colonel Looney was induced to go into a speculating scheme, which will prove disastrous to him if the note in suit is enforced against him, is true. And it may be conceded that the evidence in the case shows that the inducement which operated upon him and led him into this venture was a great overvaluation of the property and of its income, and a serious undervaluation <sup>285</sup> of the encumbrances on this property, made by parties in whom he reposed confidence.

And it may be granted, further, that the record shows that he was informed that his subscription of fifty thousand dollars would complete the sum of three hundred thousand dollars to be raised by the syndicate, and that this amount would be sufficient to discharge the liabilities of the Sheffield Land, Iron & Coal Company, and that in neither respect was the statement true. But, granting all these as facts clearly made out, yet they are not, of themselves, sufficient to relieve him from lia-

bility on this note. To work this result, these misrepresentations must have been made by the vendor of this property or by some one authorized to act for it. On this point Colonel Looney says that J. C. Neely and Napoleon Hill, of Memphis, E. W. Cole, Lewis Baxter, and others, of Nashville, were stockholders in that company and creditors of it, the three first named in very large amounts; that they induced Charlie Sykes, who was then its president and also a creditor of the company, to form a syndicate for the purpose of purchasing a part of the assets of the company, the object and purpose of the originators of the syndicate being to apply the purchase money they realized to the syndicate to the payment of the debts of the Sheffield Land, Iron & Coal Company, all of which were a charge upon the entire property of that company, and leave a portion of its property "free of any encumbrance whatever."

He further says that these parties solicited subscriptions <sup>286</sup> from persons who were not creditors of the company, but that he knew of no one save himself, not a creditor, who took any interest in the syndicate. He also states in his deposition that he received two letters, one from Charles Sykes, whom he denominates "the promoter and organizer of the syndicate," and the other from J. C. Neely, a member of the syndicate, together with a schedule of assets that the syndicate proposed to buy, and that, relying on the truthfulness of the statements contained in these letters and in the schedule, he was induced to identify himself with the scheme. These letters were exhibited to the court by him. The letter of Sykes did not profess to come from him as the president, or in any other respect as the representative of the selling company, but distinctly as the agent of the syndicate. He says, in reference to the Sheffield syndicate: "I beg to make the following statement: I was employed by some gentlemen, who were interested in the town, to go there and make an examination of the property offered, and, in addition, to make a conservative estimate of what could be realized from it. I had no idea of being interested in the company when I went down there. After looking the matter over thoroughly, I have agreed to put my money in it. I feel that, with careful management, I will get three dollars out for every dollar I put in. You, in my opinion, need not hesitate to say to your friends that this is an exceptional opportunity to make big money." <sup>287</sup> In his letter, Mr. Neely says: "You ask me to say what I know about the Sheffield syndicate, and will say, in reply, that I have known the town of Sheffield since it was



first surveyed into lots. I have seen a schedule of property offered the syndicate for three hundred thousand dollars, and have seen the property and know of its value. I think the property worth three times the amount valued above. I have subscribed myself, and would subscribe largely had I the ready money in hand." The schedule of property referred to in these letters, and the one furnished by Sykes to Colonel Looney, shows the face or par value of the assets, which the syndicate proposed to buy for the sum of three hundred thousand dollars, to be two million four hundred and fifty thousand and twenty-three dollars and fifty-one cents, and the estimated value to be one million and twelve thousand six hundred and seventy-six dollars and eighty-one cents. Not only this, but Mr. Charles Sykes, the promoter of this scheme, in his deposition taken in the interest of and read in behalf of Colonel Looney, says: "I was employed by a syndicate to purchase the assets of the said Sheffield Land, Iron & Coal Company, and the said syndicate purchased the assets and property from the Sheffield Land, Iron & Coal Company for the sum of three hundred thousand dollars, and paid the sum in cash, or the valid subsisting indebtedness of that company."

It thus will be seen, whatever misrepresentations were the moving inducement to Colonel Looney to enter into this unfortunate speculation, came not from the company selling these assets, but from his associates in the syndicate purchasing them. After a diligent <sup>288</sup> examination of the record, we have not been able to discover a single misleading act or word of the vendor corporation, or any one authorized to represent it, which induced this sale. It seems to have been the passive recipient of the consideration for its assets, and whatever of wrong there may have been in the transaction, was practiced upon Colonel Looney by parties interested with him in the speculation. This being so, we know of no rule of law which would place upon the innocent vendor the responsibility of a fraud or misrepresentation practiced by one or more of a number of vendees upon others associated with them in a purchase. And even as to these parties, Colonel Looney, in his deposition, repeatedly acquits them of all intention to wrong or defraud him, but says that he is satisfied they thought they would bring him out all right. In addition, however, the record shows that the trade with the Sheffield Land, Iron & Coal Company was consummated, and that the assets purchased were conveyed by that company to one Cheany, and that he at once conveyed them to a new corporation

organized as was contemplated by the parties composing the syndicate, and known as the Sheffield City Company, and that company accepted them at the valuation of one million dollars, and upon the basis of this valuation issued one hundred and fifty thousand dollars of its capital stock to Colonel Looney, as representing his interest in the institution. It is true this stock was not actually turned over to him, but was held as collateral to his notes, yet it was <sup>289</sup> receipted for by him, and was thus recognized by him as the fruit of his investment.

But, independent of the question just considered, this defense cannot be maintained against the United States National Bank. The facts with regard to the ownership of the note sued on by that bank are as follows: In October, 1892, this bank was the owner and holder of a note of the Sheffield Land, Iron & Coal Company for the sum of eleven thousand three hundred and ninety-one dollars and eighty-two cents, besides interest, and, at the same time, it held a claim, in the shape of an overdraft against the Bank of Commerce, of Sheffield, Alabama, for three thousand seven hundred and ninety dollars and ninety-one cents. In this latter bank the Sheffield Land, Iron & Coal Company held a controlling interest. Mr. Sykes, representing a new corporation called the Sheffield City Company, to which the Looney notes had been assigned, proposed to the officers of the United States National Bank that, if they would discount the note of twelve thousand five hundred dollars here sued on, that the proceeds of the discount might be applied to the extinguishment pro tanto of the two debts just mentioned, and that the excess of indebtedness over the discount would be paid to it in cash. This proposition was accepted by the United States National Bank, and the arrangement suggested was carried out in every respect. The bank thus received this note and the cash necessary to complete the transaction, and at the same time surrendered to the Sheffield City Company, as an extinguished liability, the note of the Sheffield Land, Iron & Coal Company, and certain collateral attached <sup>290</sup> to it, including its claim against the Bank of Commerce.

The note of Colonel Looney was indorsed by its payee and by the Sheffield City Company, before its maturity, to this bank, and was taken by it without any notice of the circumstances under which it had been obtained. Pretermittting for the moment the effect on its negotiability that this note was made payable to "Joseph Sykes, trustee," and so indorsed by him, there is

no question but that the facts just detailed make this bank a bona fide holder for value.

The extinguishment of the note of the Sheffield Land, Iron & Coal Company, and the surrender of the collaterals to secure it, and the discharge of the Bank of Commerce from liability on its overdraft constituted the United States National Bank a purchaser for value in due course of trade of this note. This proposition is clearly established in this state: *Nichol v. Bate*, 10 Yerg. 429; *Cherry v. Frost*, 7 Lea, 1; *Jordan v. Jordan*, 10 Lea, 134; 43 Am. Rep. 294; *Lookout Bank v. Aull*, 93 Tenn. 646; 42 Am. St. Rep. 934. But it is said the fact that this note was payable to "Joseph Sykes, trustee," and was so indorsed by himself, of itself lets in against the bank all equities that attached to it in the hands of the original parties, and the cases of *Alexander v. Alderson*, 7 Baxt. 403, *Covington v. Anderson*, 16 Lea, 310, and *Caulkins v. Gaslight Co.*, 85 Tenn. 684, 4 Am. St. Rep. 786, are cited as sustaining this contention.

<sup>291</sup> All of these cases involve controversies between the owners of trust funds and parties who set up a title to such funds by transfer from trustees in fraud of their trusts, and where the paper transferred or assigned on its face gave notice of the existence of a trust. *Alexander v. Alderson*, 7 Baxt. 403, was a case of a note payable to Alexander, "trustee," by him assigned in payment of an individual liability, and the question there was, Were the indorsees bona fide holders of the note, so as to be able to resist the claim of the beneficiaries? Upon the authority of *Duncan v. Jaudon*, 15 Wall. 175, this court held that the word "trustee" gave notice of the existence of a trust, and that the party taking the paper was charged with the duty of ascertaining what, if any, restrictions were imposed on the trustee in the management of the trust. To like effect are *Covington v. Anderson*, 16 Lea, 310, and *Caulkins v. Gaslight Co.*, 85 Tenn. 684, 4 Am. St. Rep. 786. None of these cases, however, involve the question we have here. Similar to them is the case of the *Third Nat. Bank v. Lange*, 51 Md. 138, 34 Am. Rep. 304. There a trustee violated his duty by disposing of a note payable to himself, as trustee, and it was said by the court: "It [the note] cannot be read understandingly without seeing upon its face that it is connected with a trust, and is a part of a trust fund. It was the duty of the bank, before purchasing it, to have made inquiry into the right of the trustee to dispose of it."

The correctness of these holdings is now conceded <sup>292</sup> by the courts with practical unanimity. The effect of them is that, if



the trustee, Sykes, disposed of this paper in violation of his trust, then the word "trustee" would convert anyone who so obtained it into a constructive trustee, at the instance of the cestui que trust.

But it is certainly true, as Mr. Perry says, "the mere fact that the word 'trustee' is on the face of the securities cannot put a purchaser to any inquiry beyond ascertaining whether the trustee has power to vary the securities. If he has such power, a purchaser in good faith will be protected, although the trustee use the money for his private purposes. But if a purchaser takes securities from a trustee, with the word 'trustee' upon their face, in payment of a private debt due from the trustee, the sale may be avoided by the cestui que trust, or the purchaser may be held as a trustee": 1 Perry on Trusts, sec. 225. Here we find an intelligent statement of the rule and its limitations. The rule is, that he who takes a security from a trustee, with his fiduciary character displayed upon its face, is bound to inquire as to his right to dispose of it, but if, on inquiry, it is found that there is no restriction upon the trustee's power of disposition, or (it may be added) there is nothing in the nature of the transaction to indicate any abuse of his trust, then the title of a purchaser in good faith, for value and before maturing, will be protected.

In the case at bar, an inquiry would have disclosed <sup>293</sup> that the word "trustee" in this connection was purely descriptive and without any legal signification. That the trust deed executed by Colonel Looney and wife was in the ordinary form, made to Sykes, as trustee, conveying to him certain real estate of Mrs. Looney's, with this recital: "That, whereas R. F. Looney, Sr., has subscribed fifty thousand dollars toward the formation of a syndicate for the purchase of the assets of the Sheffield Land, Iron & Coal Company, and to this end has executed his two several promissory notes for twelve thousand five hundred dollars each, due in six months from date, payable to the order of Joseph P. Sykes, trustee, which said two notes are a part of the fifty thousand dollars subscription, now, in order to make certain the payment of said two notes, etc., we hereby bargain and convey unto the said Joseph P. Sykes, trustee," etc.

In other words, an examination would have disclosed, neither upon the face of this trust deed nor elsewhere in the transaction, any restriction upon the power of the payee, Sykes, nor any limitation upon his right to indorse and turn over the note in question for the consummation of Colonel Looney's subscription to the syndicate, but, on the contrary, that it was made for that

purpose, and none other. The record showing that the note in suit, and the others mentioned, were delivered to Mr. Sykes, the constituted representative of the syndicate, to be transferred by him in payment of Colonel Looney's subscription thereto, and that they were so used, and <sup>294</sup> that the note sued on passed, under the circumstances already detailed, into the hands of the cross-complainant bank, its title will be protected. This principle or rule was recognized by us in affirming the decree of the court of chancery appeals in *Fox v. Citizens' Bank etc. Co.* (Tenn. Ch. App., June 13, 1896). And see *Downer v. Read*, 17 Minn. 493; *Davis v. Garr*, 6 N. Y. 124; 55 Am. Dec. 387; *Westmoreland v. Foster*, 60 Ala. 448. But it is insisted that, at least, a settlement made between the United States National Bank and the Sheffield City Company, dated January 31, 1895, extinguished this note, so far as Looney and his accommodation indorser, Sykes, was concerned. It will be remembered that this note was transferred to its present holder by the Sheffield City Company, the last indorser. By the terms of the agreement, or settlement, as it is called, the Sheffield City Company was permitted to substitute with the bank certain securities it owned, in the place and stead of its guaranty or indorsement of this note, and the bank obligated itself not to sue on the guaranty or indorsement, but it was expressly stipulated that this settlement was in no way to affect the liability of the other parties to the note.

It was also agreed that as money was collected from the other parties, that it should be credited to the Sheffield City Company, and a like amount of its securities should be returned to it. In other words, this agreement simply substituted certain securities of the Sheffield City Company for its general liability <sup>295</sup> as indorser, and secured for it a dismissal of a suit then pending to enforce this liability, but in no way affected the relations of the other parties to this note.

This leaves undetermined alone the question of the extent of the obligation of J. P. Sykes on this note. Did the addition of the word "trustee" to his name limit his responsibility as its indorser? He waived demand and notice of protest by a writing when he indorsed it, so that his liability was fixed on the maturity and nonpayment of the note, unless it be that the addition of the word "trustee" relieves him. This question is settled against the indorser by a great weight of authority. *Taft v. Brewster*, 9 Johns. 334, 6 Am. Dec. 280, was a case of parties signing a bond as trustees of the Baptist Society, etc., and the court said: "The bond must be considered as given by the de-

defendants in their individual capacity. It is not the bond of the Baptist Church, and if the defendants are not bound, the church certainly is not. The addition of 'trustee' to the name of defendants is a mere *descriptio personarum*." In *McClure v. Bennett*, 1 Blackf. 189, 12 Am. Dec. 223, makers of a note appended to their names the words "trustees of the First Presbyterian Church of Madison," and yet they were made personally liable. And in *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529, the court held that a party signing a note, with the word "trustee" added, was individually bound, and evidence was inadmissible <sup>296</sup> to show that, at the time he affixed his signature, there was an agreement that he should not be liable personally, but that the note should be paid out of a trust fund.

In this last case the court quoted at length from section 63 of Story on Promissory Notes, as follows: "As to trustees, guardians, executors, and administrators, and other persons acting *en autre droit*, they are, by law generally, held personally liable on promissory notes, because they have no authority to bind *ex directo* the person for whom, or for whose estate, they act, and hence, to give any validity to the note, they must be deemed personally bound as makers. It is true that they may exempt themselves from personal responsibility by using clear and explicit words to show that intention, but, in the absence of such words, the law will hold them bound." To the same effect are *Binney v. Plumley*, 5 Vt. 500; 26 Am. Dec. 313; *Clap v. Day*, 2 Me. 305; 11 Am. Dec. 99. So in this state it has been held that a note signed with the words "administrator or guardian" affixed to the name of the maker, is the latter's personal note: *Erwin v. Carrol*, 1 Yerg. 144; *McWherter v. Jackson*, 10 Humph. 209; *Carter v. Wolfe*, 1 Heisk. 694.

Now, does it affect the liability of the indorser on this paper, that the knowledge was communicated to the bank, when this note was delivered to it, that Mr. Sykes had no interest in the transaction of which it formed a part? For it is clear that notice <sup>297</sup> to a bank discounting accommodation paper that the indorser is lending his credit to the maker, does not affect the bank or relieve the indorser: *Philler v. Patterson*, 168 Pa. St. 468; 47 Am. St. Rep. 896.

The result is, the chancellor's decree dismissing the cross-bill of the United States National Bank, and sustaining the respective cross-bills of Looney and wife and Sykes, and of Buchanan and others, is reversed, and a decree will be entered here, in accordance with the prayer of the first one of these cross-bills, in favor of the United States National Bank.



**SALES—FRAUD OF THIRD PERSON NOT GROUND FOR RESCISSION.**—The fraud of a third party inducing the purchase of goods cannot entitle the purchaser to rescind. If the seller is not party to the fraud, the contract must stand: *Nash v. Minnesota Title Ins. etc. Co.*, 163 Mass. 574; 47 Am. St. Rep. 489, and note.

**NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER—WHO IS.**—One who purchases negotiable paper before its maturity for a valuable consideration, in the usual course of business, without knowledge of facts which impeach its validity as between antecedent parties, or which ought to excite suspicion in the mind of a prudent man, is a bona fide holder, and takes the paper free from defense on the part of the maker: *Ruble v. Davis*, 33 Neb. 779; 29 Am. St. Rep. 509, and note; *Koehler v. Dodge*, 31 Neb. 328; 28 Am. St. Rep. 518, and note; *East Birmingham etc. Co. v. Dennis*, 85 Ala. 565; 7 Am. St. Rep. 73.

**NEGOTIABLE INSTRUMENTS—ACCOMMODATION PAPER.** Notice to a bank discounting accommodation paper, that the indorser is lending his credit to the maker does not affect the bank or relieve the indorser: *Philler v. Patterson*, 168 Pa. St. 468; 47 Am. St. Rep. 896. And successive indorsers for the accommodation of a third person are liable in the same order as indorsers for value, though each of them knew that the indorsement was for accommodation; *Moore v. Cushing*, 162 Mass. 594; 44 Am. St. Rep. 393. See monographic note to *Altoona Second Nat. Bank v. Dunn*, 31 Am. St. Rep. 745-757.

**TRUSTS—NOTICE OF, FROM USE OF WORD "TRUSTEE."**—The addition of the word "trustee" to the name of a person is notice of a trust: *Marbury v. Ehlen*, 72 Md. 206; 20 Am. St. Rep. 467, and note. Persons dealing with a trustee must take notice of the scope of his authority: *Kirsch v. Tozier*, 143 N. Y. 390; 42 Am. St. Rep. 729, and note.

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## WATAUGA WATER COMPANY v. WOLFE.

[99 TENNESSEE, 429.]

**CORPORATIONS.—WATER COMPANIES ARE PUBLIC CORPORATIONS** when chartered under the general laws of the state, and given the right of eminent domain, and the powers, privileges, and franchises of operating waterworks to furnish a city and its inhabitants with water.

A WATER COMPANY CANNOT, AT ITS ELECTION AND WITHOUT GOOD REASON, serve one part of the community and not another. It is bound to furnish water without discrimination to inhabitants of the city.

A WATER COMPANY MAY ADOPT REASONABLE RULES for the conduct of its business and the operation of its plant, and such rules, so far as they affect its patrons, are binding upon them, and may be enforced by the company to the extent of refusing to supply water to those who refuse to comply therewith.

**WATER COMPANIES—RULES AND REGULATIONS.**—A person desiring to be furnished with water by a public water company may be required, as a condition precedent, to sign an agreement to keep his hydrants closed except when using water, and, re-

fusing to sign such agreement, the company may withhold water from him.

A WATER COMPANY MAY, FOR HIS WASTING OF WATER, shut it off from the premises of a consumer.

Carr & Reeves, for Watauga Water Company.

J. B. Cox, for Wolfe.

**430** CALDWELL, J. C. H. Wolfe brought this suit against the Watauga Water Company and obtained judgment before the circuit judge, sitting without a jury, for ten dollars, as damages for its refusal to furnish him water at his residence in Johnson City. The company appealed in error.

The defendant is a water company, chartered under the general laws of the state (Code, annotated by Shannon, secs. 2499-2506), with the right of eminent domain and all essential powers, privileges, and franchises, and operating its waterworks at Johnson City under special contract with that city to furnish it and its inhabitants with water at designated rates. Being thus endowed by the state, and under contract with one of the state's municipalities, the company <sup>431</sup> is essentially a public corporation, in contradistinction from a private corporation. It is engaged in a public business, under a public grant and contract, and is, therefore, charged with public duties, and cannot, at its election and without good reason, serve one member of the community and not another. It is bound to furnish the commodity, which it was created to supply, to the city and all of its inhabitants upon the terms designated in its contract (the same being fair and reasonable), and without discrimination: *Crumley v. Watauga Water Co.*, 99 Tenn. 420; *Haugen v. Albina Light etc. Co.*, 21 Or. 411; *American Water Works Co. v. State*, 46 Neb. 194; 50 Am. St. Rep. 610; *State v. Butte City Water Co.*, 18 Mont. 199; 56 Am. St. Rep. 574; *Central Union Tel. Co. v. State*, 118 Ind. 206; 10 Am. St. Rep. 114; *Lumbard v. Stearns*, 4 Cush. 60; *Lowell v. Boston*, 111 Mass. 464; 15 Am. Rep. 39; *Williams v. Mutual Gas Co.*, 52 Mich. 499; 50 Am. Rep. 266; *Olmsted v. Morris Aqueduct Proprs.*, 47 N. J. L. 333; *Shepard v. Milwaukee Gaslight Co.*, 6 Wis. 539; 70 Am. Dec. 479; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; 2 Morawetz on Private Corporations, sec. 1129; 2 Cook on Stocks and Stockholders, sec. 932; 1 Dillon on Municipal Corporations, 4th ed., sec. 52, and note, citing *Foster v. Fowler*, 60 Pa. St. 27; 29 Am. & Eng. Ency. of Law, 19, note; 15 L. R. App. C. 322, note.

Though impressed with a public use, and under <sup>432</sup> legal obligation to furnish water to all inhabitants at the designated rates, and without discrimination, the defendant company is allowed to adopt reasonable rules for the conduct of its business and operation of its plant, and such rules, so far as they affect its patrons, are binding upon them, and may be enforced by the company, even to the extent of denying water to those who refuse to comply with them: *American Waterworks Co. v. State*, 46 Neb. 194; 50 Am. St. Rep. 610.

Wolfe had been a patron of the company, and had been accustomed to leave his hydrant open, so that large quantities of the escaping water went to waste. His claim was, that the water so wasted was stale and not fit for his use, and upon that ground he sought to justify his action; but the company thought the water not stale and the waste excessive. Complaints were made to the company by persons upon whose premises the escaping water flowed.

Wolfe ceased to take water from the company for awhile, preferring to use his well. When he applied to the company for water again, tendering all required charges in advance, he was requested to sign a regular application, and agree, in conformity to a rule of the company, that he would keep his hydrant closed except when using the water. This he declined to do, and the company refused to turn water into his hydrant. He said he "wanted pure, good water," and that he "would keep the tube open so long as it was necessary to keep the water <sup>433</sup> fresh."

Three days after the company's declination this suit was brought to recover damages. The rule in question was reasonable, and Wolfe's refusal to comply with it disentitled him to receive the water, and relieved the company of its obligation to furnish it. This does not imply that a patron of a water company is not entitled to "pure, good water," but only means that he may not set himself up as the sole judge of its quality, and execute his own adverse judgment in his own way, and without restraint, in defiance of the company, and to its inevitable detriment. It has been held, that "a rule of a water company, giving it the right to shut off water from the premises of a consumer who wastes it, is reasonable" (*Shiras v. Ewing*, 48 Kan. 170); and that holding was approved in the case of the *American Waterworks Co. v. State*, 46 Neb. 194; 50 Am. St. Rep. 610.

Reversed, and enter judgment dismissing suit with costs.

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IN THE CASE of *Crumley v. Watauga Water Co.*, 99 Tenn. 420, it was decided that a water company, operated under a charter



authorizing it to erect buildings and machinery to supply a city and the inhabitants thereof with water, and to condemn private property for that purpose, and which is obligated, under contract with such city, to furnish water therein for families and domestic purposes at customary rates, cannot refuse to supply any inhabitant of such city, at regular rates and upon its usual terms, because he refused to pay a pre-existing indebtedness against him, and in favor of the company, for water supplied to him before the making of such note. Having once given the taker of water credit, the company cannot afterward coerce payment by denying him the right to be supplied with water for which he tenders the customary and regular rates exacted for a like service from other citizens of the municipality.

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**WATER COMPANIES.**—A water company having a franchise to furnish water to a city and its inhabitants, assumes a public duty, part of which is to furnish water to all such inhabitants at reasonable rates, and not to charge any of them prices not charged to all others for a like service, and under similar conditions: *American Water Works Co. v. State*, 48 Neb. 194; 50 Am. St. Rep. 610. See *State v. Butte City Water Co.*, 18 Mont. 199; 58 Am. St. Rep. 574.

**WATER COMPANIES—RIGHT TO ENFORCE RULES.**—A water company has a right to prescribe all such rules and regulations for its convenience and security as are reasonable and just and to refuse to furnish water to any person who declines to comply with them: *American Water Works Co. v. State*, 48 Neb. 194; 50 Am. St. Rep. 610, and note.

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## PEARSON v. GILLENWATERS.

[99 TENNESSEE, 446.]

**ADMINISTRATORS, LIABILITY OF.**—An administrator is not chargeable with the loss resulting from his keeping, without sale, bank stock, when he acted in good faith, under the advice of counsel, and with a sincere desire to properly discharge the duties of his office.

**ADMINISTRATORS, LOSS RESULTING FROM FOLLOWING ADVICE OF PERSONS INTERESTED IN THE ESTATE.**—If an administrator, at the request of persons beneficially interested, or under their advice, delays the sale of personal property, in consequence of which loss is suffered, he cannot, at the instance, or for the benefit, of such interested parties, be charged with such loss.

**AN ADMINISTRATOR ACTING UNDER THE ADVICE OF COUNSEL** is protected, particularly when such advice is as to the advisability of bringing or defending suits.

**ESTATES OF DECEDENTS—SALE OF PROPERTY, WHEN SHOULD BE ORDERED.**—When a deficiency in the assets necessary to pay the debts of a decedent exists, a sale of his real property will be directed.

**THE TITLE OF THE PURCHASER OF LAND AT A JUDICIAL SALE**, upon confirmation, does not relate back to the date of the sale.

**JUDICIAL SALES—RIGHT TO RENTS AND PROFITS.**—A purchaser of land at a judicial sale is not entitled to the rents and profits for a period between the sale and its confirmation.

**APPEAL FROM ORDER CONFIRMING JUDICIAL SALE, EFFECT OF.**—If, after the confirmation of a judicial sale, an appeal is taken from the order of confirmation, its effect is thereby suspended, and the purchaser has no right to take possession, nor to collect the rents and profits.

**JUDICIAL SALES.—A RECEIVER CANNOT BE APPOINTED TO COLLECT THE RENTS AND PROFITS** of land which has been sold at a judicial sale during the time while the effect of the order confirming the sale is suspended by an appeal therefrom.

**ESTATES OF DECEDENTS, SALE OF, WHEN CANNOT BE RESISTED.**—One who is devised real property in consideration of services to be rendered by him as guardian of the minor child of a decedent, and who is appointed and renders services as such guardian, cannot resist an application by creditors of the decedent for the sale of lands so devised to pay debts.

**ADMINISTRATORS, ORDER FIXING FEES OF, WHEN NOT FINAL.**—A finding of a clerk and master on a reference as to the amount which should be paid an administrator for his services is not equivalent to the finding of a jury, and does not preclude the court, on appeal, from fixing the amount of such compensation at a less sum than that fixed by the clerk and master.

J. O. Phillips and Shields & Mountcastle, for Pearson.

Gillenwaters & Son, Jarvis & Armstrong, and Huffmaster & Chestnut, for Gillenwaters.

**448 WILKES, J.** This is a bill by the complainant, as administrator with the will annexed of Mrs. S. W. Burem, to pass his accounts and to sell land of which the testatrix died seised, for the payment of debts against her estate and the costs of administration. The defendant, J. U. Gillenwaters, is the residuary legatee and devisee, and the party mainly interested in the estate. The interest of the other parties will appear hereafter.

The court of chancery appeals has heard the cause, and it is now before us on appeal by all the principal parties from such portions of the decree of the court of chancery appeals as affect them.

The facts as found are, that Mrs. Burem died **449** owning ten thousand dollars of stock in the Rogersville National Bank of Tennessee, upon which it was claimed she was then owing two thousand five hundred dollars to the bank. She also owned other personal property of small value, and some lands, the aggregate value of her estate being about twenty thousand dollars. There were some small unquestioned debts against the estate besides the two thousand five hundred dollars referred to, and there were claims which were then disputed, and afterward litigated. She gave, by her will, sundry small legacies to her relatives, and a small amount to her church. She devised a tract of land to defendant, John B. Charles, and the residue of

her property to her adopted son, the defendant, J. U. Gillenwaters. The residue was then understood to consist of several tracts of land, some personal property, and the bank stock referred to, subject to a small amount of debts. She appointed John B. Charles testamentary guardian of her adopted son, the defendant, and devised him a tract of one hundred and ninety acres of land in consideration of the services to be performed by him as such guardian, and she gave special directions as to how he should raise and educate the ward. Mr. Charles was also appointed executor, and qualified, but ascertaining that he could not properly fill both offices at the same time, in a few days he resigned as executor and qualified as guardian or trustee under the will. Complainant Pearson thereupon qualified as administrator with the will annexed. The bank stock remained in the hands of the guardian, Charles, but was held subject <sup>450</sup> to the orders of the administrator, Pearson, and in the year 1889 he received upon it a dividend of ten per cent, and in 1890 another of eight per cent. This, with the cash realized from sales of property, was sufficient to pay all the debts recognized as valid, the debt of two thousand five hundred dollars to the bank being disputed, and afterward resisted and litigated.

An effort was made to sell one thousand dollars of the bank stock, to realize money to educate the ward, but it could not then be sold at over ninety cents on the dollar, and it was deemed advisable by the administrator, and also the guardian, to hold it, as well as the balance of the bank stock, without sale.

On April 8, 1890, suit was brought against the estate and administrator by one Lucy McMahon for about eleven hundred dollars, claimed to be owing for personal services rendered the testatrix in her lifetime, and, in April, 1890, a similar suit was brought against the estate, for similar services, for two thousand five hundred dollars by Gaylord and wife. On September 19, 1891, the bank brought suit on the two thousand five hundred dollar note. Judgments were rendered for Mrs. McMahon for eleven hundred and fifty dollars, and Mrs. Gaylord for two thousand dollars, and some time afterward, in favor of the bank on its note.

When the McMahon judgment was obtained, the administrator attempted to sell the bank stock, and advertised it, but could find no bidders. Gaylord and wife levied on it, and the administrator enjoined them from selling. Under the decrees in that injunction suit, the stock was ordered by the court <sup>451</sup> to be sold, and it was reported as sold at thirty-three to thirty-four



cents, but on the exception of the guardian ad litem, supported by affidavit from the cashier of the bank that it was worth one dollar and ten cents, the sale was not confirmed. It was again offered, and sold at forty-five cents. There appears to have been no open market for the stock, but the statements of the bank showed that it was intrinsically worth one dollar and ten cents, and some private sales were made at about this price in 1890 and 1891. The proof fails to show that it could have been sold in open market at public sale at a fair price at any time after the McMahon judgment was recovered. Previous to that time it was thought desirable to hold it as a safe investment for the ward, both by the administrator and guardian and by the ward, and they were advised to this course by their counsel, and were also advised by him to litigate the bank and other claims, so that between October 12, 1889, the date the administrator qualified, and September 29, 1891, when the McMahon judgment was rendered, it was not deemed advisable to sell the stock, nor necessary for the payment of debts, and no attempts to make such sale were made, except, as before stated, there was an effort to sell one thousand dollars of it.

The court of chancery appeals find that, beyond any sort of controversy, the administrator acted in the most perfect good faith and without a suspicion of profit or benefit to himself, and that he was all the while actuated by upright motives and a sincere <sup>452</sup> desire to properly discharge his duties; that he acted under the advice of counsel, and the litigation engaged in, while not successful, was not merely captious or idle, but necessary, and that the final outcome of the estate was not chargeable to improper administration; that the bank stock was bought in "boom times," and could not afterward be sold on account of the stringency in financial circles. Under these circumstances the court of chancery appeals was of opinion the administrator should not be charged with the full amount of the bank stock, citing *Deitz v. Mitchell*, 12 Heisk. 676, 679; *Mickle v. Brown*, 4 Baxt. 468, 475; *Matter of Cator*, 14 Lea, 408, 417; 7 Am. & Eng. Ency. of Law, 347, 359; *Perry v. Wooton*, 5 Humph. 524; *Poole v. Munday*, 103 Mass. 174, 177; *Ward v. Tinkham*, 65 Mich. 695; *James v. Wingo*, 7 Lea, 148.

In *Schouler on Executors*, section 322, it is said, in substance, that when no immediate application can be made of the funds, the personal representative is permitted and encouraged to permit quick assets, which are productive, to stand for a time uncollected (*Pritchard on Wills*, sec. 696); and the same diligence

is not exacted in personal representatives in converting into money bank stock and other securities of this kind, as in regard to other classes of personal property, especially when there is no immediate demand for the money, and the stock is yielding an income. The time, place, and terms of sale are left, to some extent, to the discretion of the <sup>453</sup> personal representative, and all that the law expects or requires is that, in view of the kind of property to be sold, its quality and value, the financial condition of the community and the exigencies of the estate, and other considerations which would influence a reasonably prudent man acting in his own affairs, the representative shall select such time, place, and terms as promise the best results to the estate. Prejudicial haste and dangerous delay are alike to be avoided. Bank stock and perishable property are not on the same footing, and should not be so treated; and if the sale is postponed for reasons rendering it improper to sell earlier, and the property is lost by events which the representative could not foresee or control, he will not be held liable when he acts in good faith: Pritchard on Wills, sec. 703; Mickle v. Prown, 4 Baxt. 468; Pomeroy's Equity Jurisprudence, sec. 1070.

So, also, if the representative delay at the request or instance of the parties beneficially interested, or under their advice, and, in consequence, a loss is sustained, the representative cannot, by such interested party, be charged with such loss: Perry v. Wooton, 5 Heisk. 524; Poole v. Munday, 103 Mass. 176; 7 Am. & Eng. Ency. of Law, 359; Ward v. Tinkham, 65 Mich. 695. And so, when the administrator or executor acts in accordance with the advice of counsel, it should be within proper limits, a protection to him: James v. Wingo, 7 Lea, 148. And especially is this so when the advice is given <sup>454</sup> as to the advisability of bringing suits, and defending against suits or claims. It is the duty of the representative in such cases to seek counsel, and to be influenced, and, within reasonable limits, to be controlled by it.

It is urged that the administrator compromised the McMahon suit at one time for twenty-five dollars, but the court of chancery appeals, on a review of the evidence, find this not to be a fact.

We are content with the holding of the court of chancery appeals as to the liability of the administrator under the facts as they are found, and do not regard him as guilty of devastavit or improper execution of his trust.

It is next insisted that under the facts presented in the record,

the administrator was not entitled to have the real estate sold to pay debts; that the personal assets having been wasted, he should be held guilty of devastavit, and required to pay these debts rather than charge them on the lands. The existence of valid debts being shown, beyond the amount of personal assets, a sale of land is proper when the administrator has not wasted the assets of the estate. When such deficiency of assets exists, it is not necessary to wait until they are actually applied before the land can be sold: *Doherty v. Choate*, 16 Lea, 192-200. Having found the question of devastavit in favor of the administrator, and there being debts of the estate to be paid, and no sufficiency <sup>455</sup> of assets to pay them, a sale of the land was authorized and proper.

It appears that on a sale of this land in the court below, T. C. Miller became the purchaser of four hundred acres of it, and it was confirmed to him on July 31, 1897, in the court below. The same day he asked that a receiver be appointed, alleging that defendant, Gillenwaters, was in possession, and had been since the testator's death, and was receiving and using the rents and profits; that there were crops of wheat, corn, oats, and grass on the land; that the wheat raised by tenants was then about ready to be delivered to Gillenwaters, as the landlord; that the crops were planted and grown after the bill was filed, and he had been advised would pass to him under his purchase, and this advice caused him to bid more for the land than he otherwise would; that they were not reserved in the sale; that Gillenwaters was insolvent, and had declared his intention to appeal the cause, in order to secure the crops and rents and profits for the year, and, in the event of such appeal, the said rents, crops, and profits would go into the hands of defendant, Gillenwaters, and be lost. To this petition defendant, Gillenwaters, demurred, on the ground that until the sale was confirmed in the supreme court, the purchaser would get no title, and be entitled to no possession. This was overruled. The chancellor granted the petition so far as it related to all crops and rents, except such as had been collected on or <sup>456</sup> prior to July 3, 1897, and put Miller in possession as receiver. Gillenwaters appealed under the pauper oath.

The court of chancery appeals held that the action of the chancellor in appointing the receiver was improper; that the case was similar to that of a vendor seeking to enforce his lien, in which case he may subject the land, but not the rents, except in certain cases (citing *Morford v. Hamner*, 3 Baxt. 391); and



also similar to a case of controverted or disputed title to land, in which case the court will not, as against the party in possession, appoint a receiver: Citing *Richmond v. Yates*, 3 Baxt. 204; *Davis v. Reaves*, 2 Lea, 649. That court accordingly held that Miller would not be entitled to the rents and crops, and from this part of the decree of the court of chancery appeals Miller appeals to this court, and assigns error.

We are of opinion the holding of the court of chancery appeals is correct in its results upon this feature of the case. A purchase of land under judicial sale is entitled to the possession of it on the confirmation of the sale, if there be nothing in the terms or decree of sale providing otherwise: *Pickens v. Reed*, 1 Swan, 80; *Armstrong v. McClure*, 4 Heisk. 80; *Ellis v. Foster*, 7 Heisk. 131; *Shields v. Thompson*, 4 Baxt. 227; *Latta v. Pierce*, 11 Lea, 267. The confirmation, however, has no retroactive effect, so as to relate back to the date of sale and give the purchaser the intermediate rents: *Armstrong v. McClure*, 4 Heisk. 80.

<sup>457</sup> In the present case the defendant, Gillenwaters, was contesting the right of the court to sell the land devised to him. The court, however, ordered and made the sale, and Miller was the best bidder for the land, and if the sale had been finally confirmed in the court below to him, he would have been at that time entitled to the possession. While it was confirmed, still the appeal of the defendant, Gillenwaters, had the effect to set aside this confirmation, as well as all other decrees, until his appeal could be heard. Pending this appeal, which was, among other things, to test the right to sell his land, he had a right to remain in possession, and to receive the rents, and the subsequent dismissal of his appeal would not deprive him of the intermediate profits. This being so, it was improper to impound these rents and profits and crops, and put them into the hands of a receiver, and the decree of the court of chancery appeals upon this point is correct, and is affirmed.

John B. Charles also appealed to this court from the decree of the court of chancery appeals, and assigns as errors that the land devised to him by the testatrix has been improperly sold to pay debts of the estate and costs of administration. His contention is, that this land was given to him in consideration of his services as guardian for the minor, Gillenwaters, and he is not, therefore, a mere voluntary grantor, but stands in the attitude of one who has paid value for his lands. This tract of <sup>458</sup> land contains one hundred and ninety acres, and was valued at three thousand dollars by the testatrix.

The said John B. Charles qualified as guardian in 1889, when the estate was believed to be not only solvent, but sufficient to pay all the legacies and satisfy all the devises in the will, and he went into possession of the land devised to him, and has had it ever since. He gave bond as guardian in the sum of thirty thousand dollars, and claims that his services were worth the real value of the farm, which sold for seventeen hundred and ten dollars. His contention is, that his services are as much entitled to be compensated for as are the solicitors, administrator, witnesses, and officers whose services have been used in the execution of the will and settlement of the estate, and that his services were recognized by the testatrix as valuable, and the amount of compensation to be paid for them was fixed by her. The chancellor decreed a sale of the land devised to him, but directed that any surplus remaining from the sale of the lands devised to Gillenwaters and Charles, after payment of debts, expenses, etc., should be paid to Charles, to the extent of seventeen hundred and ten dollars, and the court of chancery appeals affirmed the decree of the chancellor to this extent, and refused to exempt the lands devised to Charles from sale, as he insists should be done. The court of chancery appeals, however, directs the decree to be so drawn as to save to the defendant, Gillenwaters, the right to call said Charles to account for his guardianship if he shall so desire.

459 We are of opinion there is no error in the holding of the court of chancery appeals as to the rights of Mr. Charles. He was to take the lands, it is true, as consideration for his services as guardian, and to that extent and in that sense he was a purchaser for value. Still, he was to take it under the will and as derived from the estate, and he cannot set up his claim to the land under the will in opposition to the superior equities and rights of the creditors of the estate. These creditors and the expenses of administration must be paid before the legatees and devisees are entitled to receive under the provisions of the will.

It is objected that the court of chancery appeals reduced the allowance of the administrator from six hundred and fifty dollars, as fixed by the chancellor, to three hundred dollars, and from this part of the decree of the court of chancery appeals the administrator prays an appeal. His insistence is that, upon a reference, the clerk and master fixed this fee at six hundred and fifty dollars, and the chancellor concurred in the report and estimate, and this, it is insisted, has the force and effect of a verdict of a jury, and should have been so treated by the court of

chancery appeals. The concurrence of the master and chancellor as to the compensation due to an administrator for his services, and to an attorney for his fees, or a receiver or other trustee for his services, is not such a concurrence upon a question of fact as is embraced in the rule giving such concurrence the weight and effect of a finding by a jury. <sup>460</sup> At most it is on the part of the clerk and master and the chancellor but an expression of opinion or an estimate; and, while their estimates are entitled to weight because they are familiar with such fees and allowances as a rule, and with the services rendered in the particular case, still, their concurrence does not have the effect as contended, and the court of chancery appeals was authorized to put its estimate upon the allowance independent of that of the chancellor and master, and likewise this court can review the estimate of the court of chancery appeals, because it is not a fact found by that court, but their judgment and estimate upon the facts and upon the record.

It is true, in the case of *Hicks v. Porter*, 90 Tenn. 13, the rule is suggested in the opinion of the special judge delivering it as contended for, but in that case the fees of the guardian ad litem were fixed at an amount satisfactory to the court, and for this reason was affirmed, and the statement that the rule of concurrent finding applied in such cases, by the learned special judge escaped correction by the court, which agreed in the result in that case, without reference to the rule, and it was inadvertent, and has not been since followed, and is not correct.

When the matter was in the chancery court there was no exception, in express terms, made to the amount allowed, the exception being that nothing should be allowed, in view of the devastavit and waste committed by the administrator, and, again, if anything <sup>461</sup> was allowed, it should be charged up against the defendant, Charles, and not taken out of the estate. We think the exception that nothing should be allowed, embraces the feature presented; that the amount allowed is excessive, and this error, is not, therefore, well assigned, but we are content with the amount fixed by the court of chancery appeals, in view of all the facts and circumstances in the case. There are other matters of minor importance involved in the cause, but those already disposed of are the principal ones. We are entirely content with the disposition made of the others, and with the result reached by the court of chancery appeals, and their decree is affirmed, and the costs will be paid as they have directed.



**EXECUTORS AND ADMINISTRATORS—CARE REQUIRED IN MANAGING ESTATE.**—Executors, administrators, or trustees acting with good faith, and without any willful default or fraud, are not responsible for any loss that may arise to the estate which they represent. They are not liable beyond what they actually receive, unless guilty of gross negligence: *Webb's Estate*, 165 Pa. St. 230; 44 Am. St. Rep. 666; *Moore v. Eure*, 101 N. C. 11; 9 Am. St. Rep. 17, and note.

**TRUSTS—UNAUTHORIZED ACT OF TRUSTEE—WHEN BINDS BENEFICIARY.**—Acquiescence by a cestui que trust in an unauthorized act of the trustee may make it binding upon him and release the trustee; but, in order to do so, the acquiescence must be complete and free, and with full knowledge: *Monographic note to Day v. Brenton*, ante, p. 460.

**NEGLIGENCE—RELYING UPON ADVICE OF COUNSEL.**—Relying upon the advice of counsel cannot make that conduct prudent which the law regards as careless: *Doran v. Dazey*, 5 N. Dak. 167; 57 Am. St. Rep. 550.

**JUDICIAL SALES—CONFIRMATION.**—After a judicial sale is confirmed, the confirmation relates back to the day of the sale, and the purchaser is entitled to everything he would have been entitled to had the confirmation and conveyance been contemporaneous with the sale: *Monographic note to Watson v. Tromble*, 29 Am. St. Rep. 497.

**JUDGMENT—APPEAL FROM—EFFECT OF.**—If a judgment, final in form, has been entered, and which is final at least to the extent that it cannot be set aside by the court which pronounced it, it would seem that the prevailing litigant should be entitled to the fruits of his judgment, even though an appeal has been taken, unless the statute expressly provides that the enforcement of the judgment may be suspended by an undertaking or other security, and such security had been given: *Extended note to Naftzger v. Gregg*, 37 Am. St. Rep. 31; *Parkhurst v. Berdell*, 110 N. Y. 386; 6 Am. St. Rep. 384, and note; *Nill v. Comparet*, 16 Ind. 107; 79 Am. Dec. 411, and note.

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## BANK v. MORROW.

[99 TENNESSEE, 527.]

**EXECUTION, WHAT NOT SUBJECT TO.—THE RIGHT TO PLACE AND KEEP IN A COLLEGE** one pupil, who shall have the right to board, tuition, and all the other advantages of a college free of charge, is not subject to be seized for debt.

Mayfield & Son, for Bank.

Webb & McClung, for Morrow.

527 WILKES, J. Centenary Female College is a chartered institution for the education of girls, located at Cleveland, Tennessee. Defendant Morrow, who was at the time a man of wealth and public spirit, donated and paid to it five thousand dollars. About the same time Mr. Hale agreed to give five thousand dollars, but he became afterward unable to do so. Thereupon, defendant Morrow assumed and paid this amount also.

The authorities of the college in grateful acknowledgment <sup>528</sup> of the gift, bestowed upon each of the parties the right to appoint a pupil to attend the college and receive its benefits and advantages free of charge. This was done by resolution, with suitable laudatory preamble, and is in the following words:

“Resolved, that the board hereby gives and grants to James W. Hale and William Morrow each a scholarship perpetual in Centenary College, which shall give the right to place and keep in the college one pupil, who shall have all the advantages of the college (board, furnished room, fuel, lights, tuition in literary department, tuition in musical department, tuition in art department) free of charge.”

An addition to the college was erected and named the “Hale and Morrow Wing,” and a hearty indorsement of the use of the Bible as a text-book in the college was also expressed. A certified copy of the resolutions were sent to Hale and Morrow. Some years thereafter Dr. Morrow became involved in financial embarrassments, resulting in his insolvency. The complainant bank was one of his creditors, and, in October, 1893, recovered a judgment against him for eight thousand dollars, upon which execution issued and was returned nulla bona. It then filed its bill against Morrow, and sought to subject to sale for its debt the right or power to appoint to a scholarship vested in him by said proceedings and resolution. The bill proceeds upon the theory that Morrow had paid the entire ten thousand dollars, and was entitled to the two scholarships; that they were property rights, and <sup>529</sup> subject to sale for his debts. An attachment issued, and the officer returned that he had levied it upon the scholarship in the hands of the college, and had notified the president of its board of trust and of the college faculty.

Morrow answered the bill, admitted the judgment and his insolvency, but denied that he had shifted or concealed any of his property to evade his creditors. He set out fully the circumstances of the gift of five thousand dollars, and the subsequent assumption and payment of the amount promised by Hale, of five thousand dollars, and stated that the gifts were unconditional, and the subsequent act of the college in conferring upon him the power of appointment was voluntary, and that, in view of his payments of his own and Hale’s gifts, he had been permitted to send two pupils to the college, and that he had exercised this privilege by appointing worthy daughters of poor ministers.

After his answer was made, Hale was made a party by amend-

ed bill and publication, and it was alleged that all Hale's rights and privileges in the premises had become vested in Morrow, and hence both scholarships were subject to his debts.

A pro confesso was taken against the college and against Hale, and a decree was rendered holding that the scholarships were vested rights in defendant, Morrow; that they had been rightfully attached, and they were ordered to be sold by the master. They were sold October 5, 1895, the bank buying one of the scholarships for five hundred and twenty-five dollars, and one James M. London the <sup>530</sup> other for five hundred dollars. The sale was reported, but has not been confirmed.

A writ of error was granted to defendant, Morrow, to bring the case to the supreme court. The cause has been heard by the court of chancery appeals, and the decree of the court below reversed, and it is now before us on appeal of complainant, and errors assigned by it.

The question presented is whether this right of appointment vested in defendant, Morrow, is such property as can be taken for debt. It is argued that it is a valuable property right, that it is perpetual, that it is unlimited as to time and unconditional, that it can be disposed of by will or deed or other proper transfer, and that the courts can divest it out of him and vest it in another.

The only question before us is whether it can be seized for debt and sold at public sale. As to whether it can be revoked by the college authorities, we are not called upon to decide; neither are we called upon to say whether Morrow may devise or give it to another. None of these questions are involved in this case except very remotely and incidentally. We have not been furnished with any authority upon this novel question.

It will be noted that it was not a case of an ordinary scholarship sold by an institution to a purchaser, with right to use or sell and transfer it as he might choose, as is often done by schools. Nor is it a power over or attached to real estate or tangible <sup>531</sup> property. It is not, in any correct sense of the term, an estate. It is merely a privilege or power to be exercised by, and with consent of, the college, and under its rules and regulations. Certainly the power cannot be exercised and appointment made, except under such reasonable rules and requirements as the college might dictate. It must be subject to the charter and regulations which control the institution. Doctor Morrow, subject to these limitations, can appoint whom he pleases. He can decline to appoint altogether. It is a privilege personal to



him as long, at least, as he sees proper to exercise or refuse to exercise it. It does not appear that he has attempted to use it for any pecuniary or personal benefit. The appointment had been treated as an act of charity. If it can be sold publicly, any person might buy, and the power of appointment might thus be vested in disreputable hands. We do not think it is such a right as can be seized and sold for debt.

Let the decree of the court of chancery appeals be affirmed.

#### EXECUTION—WHAT PROPERTY MAY NOT BE REACHED.

An untransferable certificate of membership of a board of trade is not property subject to judicial sale: *Barclay v. Smith*, 107 Ill. 349; 47 Am. Rep. 437. Execution cannot be levied upon a hope or probability that money may become due and payable to the defendant upon the happening of some future event: *Baker v. Copenhagen*, 15 Ill. 103; 58 Am. Dec. 600.

## BIRD v. RAILROADS.

[99 TENNESSEE, 719.]

**CARRIERS.—THE FIRST OR INITIAL CARRIER** may undertake the transportation of goods to the terminus of its line merely, and hence may, by stipulation or condition in its bill of lading, limit its liability to its own line.

**CARRIERS.—EACH OF SEVERAL CONNECTING CARRIERS** over all their routes is entitled to the benefit of any lawful exemption or exception contained in the bill of lading issued by the initial carrier, though such carrier restricts its liability to its own lines.

**CARRIERS, INTERMEDIATE, DUTIES OF.**—Where a second, or intermediate carrier, in delivering goods to a third carrier, is, by the latter, informed that they will not be forwarded until the freight charges are paid, it becomes the duty of the intermediate carrier to notify the shipper or the initial carrier, and such intermediate carrier is answerable for the loss of the goods through their being detained for the nonpayment of charges, because the shipper is ignorant of the demand for such payment by the third carrier.

**CARRIERS, NEGLIGENCE, STIPULATIONS SEEKING TO EXCLUDE FROM LIABILITY FOR.**—A common carrier cannot stipulate for exemption from liability for his own negligence.

**CARRIERS.—A PREPAY STATION IS ONE** at which the carrier delivers freight to the consignee, directly and without the intervention of a local agent, and to which consignments are accepted only upon the condition of charges for transportation being prepaid by the shipper.

**CARRIERS, CONNECTING.—THE INITIAL AND INTERMEDIATE CARRIERS**, by accepting goods for transportation to a designated station beyond the line of their routes, thereby represent to the shipper that such station is not a prepay station, and obligate themselves to see that the shipper is not injured by a demand made by the final carrier for the payment of freight charges as a condition precedent for the transportation to such station.

M. F. Caldwell, for Bird.

Jourolmon, Welcker & Hudson, for Southern Railroad.

Richmond, Chambers & Head, and Welcker & Parker, for Cincinnati, New Orleans & Texas Pacific Railroad.

<sup>720</sup> CALDWELL, J. Bird, Dew & Hale, of Powell's Station, Tennessee, consigned a box of fruit trees, by <sup>721</sup> rail, from that place to themselves, in care of J. L. Hale, at George's Creek, Kentucky. The route covered parts of three connecting and distinct lines of railway—the Southern Railway Company being the initial, the Cincinnati, New Orleans & Texas Pacific the intermediate, and the Chesapeake and Ohio the ultimate carrier. The box never reached its destination. It was transported with reasonable expedition and care by the first and second companies over their respective parts of the route, and was by the second company delivered to the third, in good condition, at their connecting point in Cincinnati, where the third company detained it until the trees perished, and then threw them aside. Thereafter Bird, Dew & Hale, who were both consignors and consignees, brought this action against the first and second companies, and sought to recover from them jointly the value of the trees. On the trial the initial carrier was discharged, and judgment was rendered against the intermediate carrier for one hundred and forty-six dollars and sixty-six cents, the proven value of the trees. The latter carrier and the plaintiffs appealed in error.

The contract of shipment was made between the shippers and the initial carrier, and was for through transportation from the receiving point to destination. The printed form of contract, or bill of lading, then in use by that carrier, contained the provision that, "in case of loss, damage, detriment, or delay, that road in whose actual custody the goods were at the time of such loss, damage, detriment, or delay, shall <sup>722</sup> alone be responsible." Whether or not this provision was contained in the bill of lading for the trees here involved, was a matter of controversy in the court below. The plaintiffs affirmed, and the defendants denied, that it was stricken out of the printed form before the bill of lading was made out and delivered. The trial judge properly submitted this issue of fact to the jury, with instruction that the initial carrier was entitled to the full benefit of the provision in question, if it should be found to have been embodied in the bill of lading when delivered, and if not, that its liability was not so limited.

The jury's verdict resolved the issue in favor of this carrier, and is conclusive in this court of the proposition that the controverted clause was really in the bill of lading when delivered.

The first carrier had the legal right, at its election, to undertake the transportation of the goods to the terminus of its own line merely, or to their ultimate destination. It was under no legal obligation, in the first instance, to transport them beyond the end of its own line, and, for that reason, it was authorized in law, when contracting for through transportation, to limit its liability by the clause mentioned: *Merchants' etc. Co. v. Bloch*, 86 Tenn. 415; 6 Am. St. Rep. 847; *Railroad Co. v. Brumley*, 5 Lea, 401; *Dillard v. Louisville etc. R. R. Co.*, 2 Lea, 288; *Telegraph Co. v. Munford*, 87 Tenn. 190; 10 Am. St. Rep. 630; 4 Elliott on Railroads, sec. 1432; *Lawson's Contracts of Carriers*, sec. 236; *Schouler's* 723 *Bailments and Carriers*, sec. 603; 2 Am. & Eng. Ency. of Law, 866, 867.

The trial judge, in his instruction to the jury concerning the effect of that clause in the bill of lading, if proven, erroneously limited its advantage to the initial carrier, and improperly denied the intermediate carrier the benefit of it in any event.

The contract made by the shippers and the initial carrier having been for through transportation over a particular and designated route, such of the other companies in that route as may have accepted the goods under that contract, became subject to its legal liabilities and entitled to its legal exemptions, the same as the initial carrier. *Schouler* says: "Where the freight contract is for through transportation, but not otherwise, each connecting carrier, as a rule, will be entitled to the benefits and exemptions of the contract made by the shipper and the first carrier": *Schouler's Bailments and Carriers*, sec. 604, p. 637. "If a connecting railroad company," observes Elliott, "is designated as such in the initial carrier's bill of lading, or if the bill provides that all stipulations shall inure to the benefit of all the carriers, then, having accepted the goods thereunder, without any separate agreement, it becomes virtually a party to the contract, bound by the undertaking therein, and benefited by the limitations": 4 Elliott on Railroads, sec. 1446.

The statement of another author is as follows: "A bill of lading may provide that its stipulations 724 shall extend to and inure to the benefit of each and every company or person to whom the carrier issuing it may intrust or deliver the property, in which case its terms will define and limit the liability of every succeeding carrier. And in the absence of an express provision



to this effect, a connecting carrier who receives the goods from another, to be forwarded to their destination, is entitled to the exceptions which the latter has made with the shipper, in case the contract with the original carrier was made for the entire route": Lawson on Contracts of Carriers, sec. 243.

Hutchinson uses this language: "Hence it follows that whenever the carrier is bound by his contract or by law to carry the goods to the place of their consignment, all carriers who engage in the transportation for any portion of the route are entitled to all protection which the first carrier has secured by his contract with the shipper": Hutchinson on Carriers, 2d ed., sec. 273.

Our holding that the intermediate carrier now before the court was entitled, under the facts stated, to the benefit of the first carrier's contract, is sustained, likewise, by the adjudged cases, some of which are cited: Halliday v. St. Louis etc. Ry. Co., 74 Mo. 159; 41 Am. Rep. 309; St. Louis etc. Ry. Co. v. Weakly, 50 Ark. 396; 7 Am. St. Rep. 104; Maghee v. Camden etc. R. R. Co., 45 N. Y. 514; 6 Am. Rep. 124; Kansas City etc. Ry. Co. v. Sharp, 64 Ark. 115; <sup>725</sup> Galveston etc. Ry. Co. v. Houston (Tex. Civ. App., May 12, 1897); Phifer v. Carolina Cent. R. R. Co., 89 N. C. 311; 45 Am. Rep. 687; Knott v. Raleigh etc. R. R. Co., 98 N. C. 73; 2 Am. St. Rep. 321.

The same principle was recognized, though held inapplicable, in McMillan v. Michigan etc. R. R. Co., 16 Mich. 79; 93 Am. Dec. 208; Adams Exp. Co. v. Harris, 120 Ind. 73; 16 Am. St. Rep. 315; Babcock v. Lake Shore etc. R. R. Co., 49 N. Y. 491.

This court indirectly approved the rule in Memphis etc. R. R. Co. v. Holloway, 9 Baxt. 188; Louisville R. R. Co. v. Campbell, 7 Heisk. 253; Deming v. Merchants' Cottonpress Co., 90 Tenn. 307; Railway Co. v. Manchester Mills, 88 Tenn. 653; Lancaster Mills v. Merchants' Cottonpress Co., 89 Tenn. 2; 24 Am. St. Rep. 586.

Nothing else appearing, the intermediate carrier would, undoubtedly, be entitled to a reversal for the error indicated. There is, however, another important aspect of the case, whose proper consideration requires an additional statement of the facts. The contract of shipment was made and the journey commenced on the 6th of November. The trees were delivered by the intermediate carrier to the ultimate carrier six days later; but on receiving them, the ultimate carrier "immediately" informed the intermediate carrier that George's creek, the point of destination, was a "prepay station," and, therefore, that the trees would not be forwarded until all freight charges should be

paid. With this <sup>726</sup> notice before it, the intermediate carrier rested without action in the matter for eighteen days, and then notified the initial carrier that the trees were detained at Cincinnati for prepayment of charges. Without consent or knowledge of the shippers, the trees were so detained until they became entirely worthless; and thereafter, in January following, they were, by direction of the initial carrier, "thrown into the dump," as so much rubbish.

These facts fix great negligence upon the intermediate carrier and justify the verdict against it. Its delivery of the trees was not complete in a legal sense, and, hence, did not terminate its responsibility under the contract. The acceptance by the ultimate carrier was conditional only, and the condition was distinctly stated at the time. The ultimate carrier was under no legal obligation to concur in the contract as made by the initial, and adopted by the intermediate carrier. It declined to do so, and its declination was conclusive. Thereupon, the intermediate carrier at once became charged with the positive duty of giving immediate notice to the initial carrier or the shippers, if not with that of advancing the charges itself. It did neither, and, by its dereliction in that regard, became liable for the delay of the trees and their consequent devitalization and worthlessness.

The disputed clause in the bill of lading, though rightfully available to the intermediate carrier in its proper scope, as has been seen, did not cover this <sup>727</sup> aspect of the case nor preclude liability for the dereliction mentioned. That stipulation was not intended to relieve any carrier from responsibility for its own negligence; nor, indeed, could it have that effect if so intended. A common carrier cannot lawfully stipulate for exemption from liability for the consequences of its own negligence. Such a contract is void because contrary to public policy: *Railroad Co. v. Lockwood*, 17 Wall. 357; *Inman v. South Carolina Ry. Co.*, 129 U. S. 139; *Dillard v. Railroad Co.*, 2 Lea, 288; *Coward v. East Tennessee etc. R. R. Co.*, 16 Lea, 225; 57 Am. Rep. 226; *Merchants' etc. Co. v. Bloch*, 86 Tenn. 397; 6 Am. St. Rep. 847; *Railway Co. v. Wynn*, 88 Tenn. 320; *Railroad Co. v. Gilbert*, 88 Tenn. 430; *Railway Co. v. Sowell*, 90 Tenn. 17.

A "prepay station" is one at which the carrier delivers freight to the consignee directly and without the intervention of a local agent, and to which consignments are accepted alone upon the condition that all charges for transportation be prepaid by the shippers. By its contract for through transportation without prepayment of charges, the initial carrier in the present case im-

pliedly represented to the shippers that George's creek, to which the trees were destined, was not such a station, and virtually assured them that no demand of charges would be made before the ultimate destination was reached; and, by receiving the goods under that contract, the intermediate carrier impliedly made the same representation and gave the same assurance. Both thereby became bound to see <sup>728</sup> that the other carrier should make no earlier demand, or, in case it should, to see that no injurious delay resulted therefrom. The shippers had a right to believe that their goods would be transported upon the terms stipulated.

In the court's charge to the jury the plaintiffs were denied any benefit of this latter aspect of the case as against the initial carrier. This denial affords ground of reversal. The provision against liability for the default of other carriers did not affect this carrier's obligation, nor that of the intermediate carrier, in relation to the other matter just considered.

For the reasons indicated, the judgment of the lower court is affirmed as to the intermediate carrier, and reversed and remanded for a new trial as to the initial carrier.

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**CARRIERS—CONTRACTS LIMITING LIABILITY.**—A common carrier cannot, by special agreement, relieve himself from the consequences of his own negligence, nor limit his liability for losses arising therefrom: *Pittsburg etc. Ry. Co. v. Sheppard*, 56 Ohio St. 68; 60 Am. St. Rep. 732, and note; *Morgantown Mfg. Co. v. Ohio River etc. Ry. Co.*, 121 N. C. 514; 61 Am. St. Rep. 679, and note.

**CARRIERS—CONNECTING—LIMITING LIABILITY.**—A common carrier may, by express contract, confine its liability for negligence to its own line, and make itself simply the agent of the connecting carrier so as to exempt itself from liability for the negligence of the operator of the connecting line: *Harris v. Howe*, 74 Tex. 534; 15 Am. St. Rep. 862, and note; monographic note to *Wells v. Thomas*, 72 Am. Dec. 231.

**CARRIERS—CONNECTING—RIGHTS ARISING FROM ORIGINAL CONTRACT.**—A connecting carrier is entitled to the benefit of all valid limitations of the carrier's liability contained in the contract between the initial carrier and the shipper: *St. Louis etc. Ry. Co. v. Weakly*, 50 Ark. 397; 7 Am. St. Rep. 104; monographic note to *Wells v. Thomas*, 72 Am. Dec. 242.

**CARRIERS—CONNECTING—DUTIES AND LIABILITIES OF.** The liability of a connecting carrier does not begin, and the duty of the first carrier is not completed until there has been an actual delivery to the connecting carrier: *Vannatta v. Central R. R. Co.*, 154 Pa. St. 262; 35 Am. St. Rep. 823, and note. Where a common carrier accepts goods directed to a point beyond his terminus, consigned to the care of a connecting carrier, and the latter refuses to accept them, the former does not discharge his duty by merely storing them, but he must inform the consignee or consignor of the interruption of the transit; and a carrier who receives goods



from a preceding carrier is bound to immediately forward them to their destination. He cannot justify their detention on the ground that, by his regulations, goods so received are not to be forwarded until the receipt of the bill of back charges: *Monographic note to Wells v. Thomas*, 72 Am. Dec. 238, 243.

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## HOCKING v. INSURANCE COMPANY.

[99 TENNESSEE, 729.]

IF INSURANCE IS MADE payable to a mortgagee as his interest may appear, he is not entitled to recover if the assured is not. Hence, no recovery can be had for his benefit if the premises are burned by the insurer for the purpose of realizing upon the insurance.

H. T. Cooper and Junius Parker, for Hocking.

Webb & McClung, for Insurance Co.

**729** BEARD, J. This bill is filed by Viola Hocking and her husband, who sue in their own right, and for the use of J. E. Hancock, to recover on a policy of fire insurance, issued by the defendant company to, and upon the application of, Viola Hocking, upon **730** her dwelling-house, the policy reciting on its face that "the loss, if any, was payable to J. E. Hancock as his interest may appear." The property covered by this policy was destroyed by fire during its life, and the question here presented is, can a recovery be made for the use and benefit of Hancock, the mortgagee, when the record discloses, beyond all doubt, that the mortgagor, Viola, burned the house for the purpose of realizing on this insurance policy. It is conceded that Mrs. Hocking, by her conduct, has forfeited all right to recover, but it is insisted that this forfeiture does not affect the mortgagee.

While a mortgagee to whom the loss under an insurance policy issued to the mortgagor, and covering the property of the latter, is made payable "as his interest may appear," is, in a large sense, an assignee to the extent of his interest (*Donaldson v. Insurance Co.*, 95 Tenn. 280), yet he does not acquire a full and absolute right, and, in case of loss, recovers in the right of the party assured, and not in his own. In the present case, it was the property of Viola Hocking that was insured and destroyed by fire, and it was she who took out this policy for his benefit. If, at any time after its issuance, the mortgage in question had been discharged, the interest of the mortgagee in this policy would have terminated, and Mrs. Hocking alone would have been entitled to its proceeds. Claiming through the assured,

Hancock had no higher or <sup>731</sup> greater right against the defendant company than she, and, as it is clear that she, being the incendiary of this property, would be repelled, he (the mortgagee) must abide the forfeiture which the conduct of his mortgagor has brought about. A large number of cases recognizing this sound principle are to be found in the reports. Among them are *Illinois Mut. Fire Ins. Co. v. Fix*, 53 Ill. 151; 5 Am. Rep. 38; *Hale v. Mechanics' Mut. etc. Co.*, 6 Gray, 169; 66 Am. Dec. 410; *Pupke v. Resolute etc. Co.*, 17 Wis. 378; 84 Am. Dec. 754; *Grosvenor v. Atlantic etc. Ins. Co.*, 17 N. Y. 391.

We agree with the court of chancery appeals that the forfeiture of all right under the policy, resulting from the conduct of the assured, the mortgagor, extends to and extinguishes the right of the mortgagee. And the decree of that court is, therefore, affirmed.

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**INSURANCE—RIGHT OF MORTGAGEE TO RECOVER THOUGH MORTGAGOR COULD NOT.**—It is usual in a policy of insurance in favor of a mortgagee to include a provision that no act or omission of the mortgagor shall affect the mortgagee's right to recover upon the policy. This provision was inserted as a result of a determination similar to that in the principal case, where the policy in question contained no such provision. In such cases it is generally held that the contract is with the mortgagor, and for the insurance of his interest, and the mortgagee can recover only where the mortgagor could have done so had the money been payable to himself instead of being payable for his benefit to the mortgagee. So, any act or omission of the mortgagor avoiding the policy as to him avoids it also as to the mortgagee: Monographic note to *Oakland Home Ins. Co. v. Bank of Commerce*, 58 Am. St. Rep. 667, 668.

CASES  
IN THE  
SUPREME COURT  
OF  
WASHINGTON.

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SMITH v. ALLEN.

[18 WASHINGTON, 1.]

**VENDOR AND PURCHASER—LIEN FOR UNPAID PURCHASE PRICE.**—Real property which has been conveyed by absolute deed is not subject to a vendor's lien for unpaid purchase money, where no such lien has been reserved by the deed or by any agreement between the parties.

**VENDOR AND PURCHASER—VENDOR'S LIEN—TRANSITORY ACTION.**—An action to recover unpaid purchase money due under an absolute conveyance of real estate is transitory and not local.

J. C. Allen, for the appellants.

G. C. Hatch, for the respondents.

<sup>2</sup> REAVIS, J. . Action instituted by plaintiffs (respondents) against defendants (appellants) to enforce a vendor's lien upon certain real property in Clallam county. In substance, the complaint is that respondents sold and conveyed by absolute deed to appellants eighty acres of land situated in Clallam county, and that defendants promised and agreed to pay the sum of one thousand dollars in installments from time to time as they were able and as plaintiffs needed the same; that the agreement to purchase was in writing, and that defendants paid on the contract the sum of six hundred and thirty-five dollars and sixty-two cents, and refused to pay the balance. The complaint concludes with a prayer for judgment against the defendants for the balance of the sum alleged to be due on the purchase price of the land, and that it be declared a first lien on the premises as a vendor's lien, and that the specified premises be sold to satisfy the same.



Defendants, at the time of the commencement of the action, were all residents of King county, and the defendants Allen each appeared and demurred to the complaint and filed a motion to change the venue to King county. Sufficient affidavits showing the residence of all the defendants in King county, and also affidavits of merits, were at the same time filed. The superior court denied the motion for a change of venue, on the ground that the suit was one to enforce a vendor's lien for balance due of the purchase price of the premises conveyed by respondents to defendant Allen. After the demurrer was overruled, the defendants answered, and a trial was had and judgment for plaintiffs with a decree establishing a vendor's lien and ordering a sale of the premises before mentioned.

The superior court evidently overruled the motion for a change of venue on the ground that the action was local because of the enforcement of a vendor's lien. Sections 158, 159, and 161 of 2 Hill's Code (Ballinger's Code, secs. 4852, 4853, 4855), control the venue of the action. The defendants having, at the proper time, shown they were residents of King county, the motion to change the venue was not addressed to the discretion of the court, but was a matter of right with the defendants.

The question of jurisdiction to try the action is determined not by the remedy requested, but by what the facts alleged in the complaint entitle plaintiffs to receive; and thus the question presented for decision here is whether real property which has been conveyed by absolute deed is subject to a vendor's lien for unpaid purchase money where no such lien has been reserved by the deed or by any agreement between the parties. No case in this state has been called to our attention where the question has necessarily arisen and been decided heretofore. It is true the expression "vendor's lien" has been used perhaps a number of times by the court, but where the lien itself, as the foundation of a right, was not necessarily involved. The policy deduced from the uniform course of legislation in this state, relative to conveyances of real estate and the title thereto, has been to enlarge the scope of the recordation of all instruments affecting real estate. Only conveyances by deed are recognized, and encumbrances are required to be placed of record. This is true of agreements subjecting real property to voluntary liens or encumbrances as in the case of mortgages, and is also required in that large class of claims of lien which are authorized by statute. Evidently the policy of our registry acts is against secret liens. The vendor's lien originally, as recognized in England, was de-

vised by courts of equity to enforce the rights of a grantor of real property against the grantee who might remain in possession after the execution of an absolute deed, and yet refuse to pay the purchase price, or any balance remaining due thereon.

<sup>4</sup> The inability to subject land by process of law to execution for a simple contract debt was recognized by the English chancellors as requiring a remedy. Hence the invention of a lien in favor of the vendor for the purchase price promised to be paid for land. The vendor's lien, at the time it originated and was enforced, was also less inconvenient and injurious against innocent purchasers or encumbrancers of land in England than in this country. The general policy of the law in England did not facilitate commerce in land as here. The law there was rather favorable toward holding landed estates together, and did not assume to make transfers easy. Thus real estate was usually improved and regularly cultivated, the ownership long established and well known, and the transfers comparatively few and usually better known than among our people. Here land is essentially a subject of trade and commerce, transfers are easy and simple, and purchasers and encumbrancers look to the record for their information. The vendor's lien in England seems to have been involved in some uncertainty, and its limitations not very well understood, until the case of *Mackreth v. Symmons*, 15 Ves. 329, decided in 1808, by Lord Eldon. In this case, the learned chancellor thought, "the doctrine is probably derived from the civil law as to goods." The case, however, reviews the doctrines and the source of its origin and the reasons and authorities by which it is supported. The final grounds upon which it has been rested are natural equity, the supposed intention of the parties, and a trust arising out of the unconscientiousness of the vendee's holding the land without paying the price.

Mr. Chief Justice Gibson of Pennsylvania, in *Kauffelt v. Bower*, 7 Serg. & R. 64, 10 Am. Dec. 428, meets this argument thus: "The implication that there is an intention to reserve a lien for the purchase money in all cases where the parties do not, by express acts, evince a contrary intention, is, in almost every case, inconsistent with the truth of the fact, and in all instances, without exception, in contradiction of the express terms of the contract, which purport to be a conveyance of everything that can pass."

But the theory that a trust arises out of the unconscientiousness of the purchaser would construe the nonperformance of

every promise, made in consideration of a conveyance of property to the promisor into a breach of trust and would attach the trust, not merely to the purchase money which he agreed to pay, but to the land which he never agreed to hold for the benefit of the supposed cestui que trust.

The earliest cases upon this subject in England were decided long after the first colonial settlements in this country. Lord Eldon, in *Mackreth v. Symmons*, 15 Ves. 329, himself said: "It has always struck me, considering this subject, that it would have been better at once to have held that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly that a purchaser might be able to know, without the judgment of a court, in what cases it would, and in what it would not, exist." But felt himself obliged to declare, as the result of all the authorities, that it was clear that different judges would have determined the same case differently. The most plausible foundation of the English doctrine would seem to be that justice required that the vendor should be enabled by some form of judicial process to charge the land in the hands of the vendee as security for the unpaid purchase money.

<sup>6</sup> The doctrine of vendor's lien has never been affirmed by the supreme court of the United States except where established by the local law. In *Bayley v. Greenleaf*, 7 Wheat. 46, Mr. Chief Justice Marshall observes: "It is a secret, invisible trust, known only to the vendor and vendee, and to those to whom it may be communicated in fact. To the world the vendee appears to hold the estate, divested of any trust whatever, and credit is given to him in the confidence that the property is his own in equity, as well as law. A vendor relying upon this lien, ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is, in some degree, accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien."

Says Mr. Justice Gray, in *Ahrend v. Odiorne*, 118 Mass. 261, 19 Am. Rep. 449: "The decisions in the courts . . . in favor of the doctrine, which are collected in the notes to 2 Sugden on Vendors, eighth American edition, chapter 19, suggest no reasons and afford no grounds why we should now for the first time adopt in this commonwealth a doctrine which has never been supposed by the profession to be in force here, which would introduce a new exception to the statute of frauds, which, as experience elsewhere has shown, tends to promote uncertainty and



litigation, and which appears to us to be unfounded in principle, unsuitable to our condition and usages, and unnecessary to secure the just rights of the parties. If no third person has acquired any rights in the land by bona fide attachment or conveyance, the original vendor may secure payment of the debt due him for the purchase money by the usual attachment on mesne process. If any third person has acquired rights in the property, there is no reason why equity, any more than the common law, should interpose to defeat them."

Under our statutes, the vendor may obtain his judgment for the purchase money, or any part thereof, which immediately becomes a lien of record upon the land sold, and under execution he may have the land sold in satisfaction of his judgment, and that, too, freed from any homestead or other claim of exemption. Thus the reason for the maintenance of the lien of the vendor is gone, and the rule has never been applicable to our condition. The adoption of the common law of England by legislative enactment in this state adopts so much of that law as is applicable to our condition, and the lien devised in favor of the vendor by the English chancellors was inapplicable to the legislation and existing conditions in this state: *Ahrend v. Odiorne*, 118 Mass. 261; 19 Am. Rep. 449; *Simpson v. Munde*, 3 Kan. 172; *Brown v. Simpson*, 4 Kan. 76; *Greeno v. Barnard*, 18 Kan. 518; *Kauffelt v. Bower*, 7 Serg. & R. 64; 10 Am. Dec. 428; *Hiester v. Green*, 48 Pa. St. 96; 86 Am. Dec. 569; *Edminster v. Higgins*, 6 Neb. 265; *Philbrook v. Delano*, 29 Me. 410; *Peck v. Culbertson*, 104 N. C. 425; *Richards v. Arms Shingle etc. Co.*, 74 Mich. 57; *Dean v. Dean*, 6 Conn. 285; *Arlin v. Brown*, 44 N. H. 102; *Perry v. Grant*, 10 R. I. 334; *Wragg v. Comptroller General*, 2 Desaus. Eq. 509; *Frame v. Sliter*, 29 Or. 121; 54 Am. St. Rep. 781; 2 Jones on Liens, sec. 1061.

The change of venue from Clallam to King county should have been granted the defendants. The cause is reversed, with directions to the superior court to proceed in conformity to this decision.

Scott, C. J., and Dunbar, Anders, and Gordon, JJ., concur.

**VENDOR AND PURCHASER—VENDOR'S LIEN.**—A grantor of real estate by a deed absolute, who delivers possession to his vendee, has not an implied lien on the real estate granted for unpaid purchase money: *Frame v. Sliter*, 29 Or. 121; 54 Am. St. Rep. 781, and note. But the principal case, as well as that just cited, is opposed to the prevailing English and American authorities: Monographic note to *Hutzler v. Phillips*, 4 Am. St. Rep. 704.

**ACTIONS—LOCAL AND TRANSITORY—ACTION TO ENFORCE VENDOR'S LIEN.**—Local actions consist, generally, of

those instituted for the recovery of real estate or for injuries thereto, or for easements; *Morris v. Missouri Pac. Ry. Co.*, 78 Tex. 17; 22 Am. St. Rep. 17. In general, actions founded on contract are transitory, and a suit to enforce a vendor's lien must be brought in the county where the vendee resides: *Monographic note to Morris v. Missouri Pac. Ry. Co.*, 22 Am. St. Rep. 22, 23.

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## STATE v. WILLIAMS.

[18 WASHINGTON, 47.]

**APPELLATE PRACTICE—CRIMINAL TRIALS.**—The failure of an appellant in a criminal case, who is in jail, to file his brief within the required time may be excused, and is not ground to dismiss his appeal, when his counsel has removed from the state and he files his brief as soon as he learns that it has not been filed.

**TRIAL—CRIMINAL CASES—CONTINUANCE TO PROCURE WITNESS—CONSTITUTIONAL LAW.**—It is error to refuse to grant a proper application for a continuance of a criminal case to procure the presence of a material witness for the accused, under a constitutional guaranty to persons prosecuted for crime, of the right to have compulsory process to compel the attendance of witnesses in their behalf.

**TRIAL—CRIMINAL CASES—RIGHT OF ACCUSED TO APPEAR WITHOUT MANACLES.**—Unless some impelling necessity demands the restraint of a person accused of crime to secure the safety of others and his own custody, the act of compelling him to appear in manacles during his trial is not only a violation of the common law, but also a violation of a constitutional guaranty that "the accused shall have the right to appear and defend in person."

**TRIAL—CRIMINAL CASES—COMPELLING WITNESS TO APPEAR IN MANACLES.**—It is error to require a witness for a person accused of crime to appear in court in manacles during the trial, although such witness, charged with the crime jointly with the accused, has been convicted upon a separate trial.

J. F. Dillon, for the appellant.

J. W. Mathews, for the state.

**48 REAVIS, J.** Appellant was convicted, in the superior court of Whitman county, of the crime of burglary. The prosecuting attorney appears on behalf of the state, and moves to dismiss the appeal because appellant's brief was not filed in due time. It appears that the time within which appellant's brief ought to have been filed expired on the second day of June, 1897, and that the brief was not filed until the twenty-third day of the same month. But the counsel who appeared for the defendant at the trial had removed from the state before the brief was filed. The defendant was at the time confined in jail, and so soon as he learned that the brief was not filed within the proper time procured it to be filed. The question not being one of

the jurisdiction of the appeal, the appellant's excuse for failure to file his brief within the proper time is deemed sufficient, and the motion to dismiss denied.

The first error assigned by appellant is the refusal of the court to grant a continuance on appellant's application because of the absence of a material witness for appellant. The affidavit, while rather general in its statement of the facts, seems to be sufficient to have entitled appellant to further time. But as this question is not likely to arise upon a new trial, it is not necessary to further notice this objection than to observe that section 22, article 1, of the state constitution guarantees to persons prosecuted for crime the right to have compulsory process to compel the attendance of witnesses in their behalf, and under this constitutional guaranty the accused has the right to compulsory process to procure the physical attendance of the witness at the trial.

It appears that during the trial the defendant was brought into court and kept there in manacles, until, upon protest of defendant's counsel, the manacles were finally removed, <sup>49</sup> but after a considerable period of time had elapsed. And further, that during the progress of the trial and when it was very dark out of doors, at the state's request, a view of the premises, which were alleged to have been entered burglariously by the defendant, was ordered by the court, and that, in the presence of the jury, manacles were placed upon the defendant, and he was ordered by the court to go with the jury to the place of the alleged burglary, and while so manacled he went with the jury a distance of three or four blocks from the courthouse and returned to the court, when the trial proceeded and defendant was permitted to remain manacled, until, at his request, the court ordered the manacles removed. It also further appears from the record that one Bates and one Helen, who were jointly charged with the same crime as the defendant, had been theretofore tried in the court and found guilty; that at defendant's request Bates was called to testify as a witness for defendant, and when Bates was brought into the courtroom to testify, and at the request of the prosecuting attorney, Helen was brought into court to remain in the presence of the jury during the time that Bates was testifying; that after Bates had given his testimony, he and Helen were manacled together in the presence of the court and jury, and that defendant protested against Bates and Helen being allowed to remain in the courtroom in the presence of the jury manacled, and requested the court to order the manacles removed. The court refused the request.



It was the ancient rule at common law that a prisoner brought into the presence of the court for trial, upon a plea of not guilty to an indictment, was entitled to appear free of all manner of shackles or bonds, and, prior to 1722, when a prisoner was arraigned or appeared at the bar of the court to plead, he was presented without manacles or bonds, unless there was evident danger of his escape: 2 Hale's Pleas <sup>50</sup> of the Crown, 219; 4 Blackstone's Commentaries, 322; Layer's case, 6 St. Tr. 4th ed. by Hargrave, 230, 231, 244, 245; Waite's case, 1 Leach, 36.

In Kelyng's Pleas of the Crown, adjudged in the reign of Charles II, "it was resolved that when prisoners come to the bar to be tried, their irons ought to be taken off, in that they be not in any torture while they make their defense, be their crime never so great. And accordingly upon the arraignment and trial of Hewler and others, who were brought in irons, the court commanded their irons to be taken off." The common law of England was expressly adopted by legislative enactment at the first session of the legislative assembly of this territory, and there is no doubt that the ancient right of one accused of crime under an indictment or information to appear in court unfettered, is still preserved in all its original vigor in this state.

In State v. Kring, 64 Mo. 591, the prisoner was convicted of murder in the first degree. The plea of insanity was before the court, and the defendant had some three months before assaulted a person in open court. He was brought into the trial court manacled, and remained some time in that condition. The supreme court, in reversing the judgment of conviction, observed: "We have no doubt of the power of the criminal court, at the commencement or during the progress of a trial, to make such orders as may be necessary to secure a quiet and safe one, but the facts stated by the court in this case, as shown by the record, that the prisoner had assaulted a person in court, about three months before the term at which he was tried, would hardly authorize the court to assume that, on his trial for life, he would be guilty of similar outrages. There must be some reason, based on the conduct of the prisoner at the time of the trial, to authorize so important a right to be forfeited. When the court allows a <sup>51</sup> prisoner to be brought before a jury with his hands chained in irons, and refuses, on his application, or that of his counsel, to order their removal, the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers. Besides, the condition of the prisoner in

shackles may, to some extent, deprive him of the free and calm use of all his faculties."

Section 22, article 1, of our constitution, declares that: "In criminal prosecutions the accused shall have the right to appear and defend in person." The right here declared is to appear with the use of not only his mental but his physical faculties unfettered, and, unless some impelling necessity demands the restraint of a prisoner to secure the safety of others and his own custody, the binding of the prisoner in irons is a plain violation of the constitutional guaranty. When the witness Bates was manacled to Helen and kept in court in the presence of the jury against the protest of defendant, defendant's right to a fair trial was impaired. It can hardly be conceived that there was any necessity for this incident to the trial; none appears in the record: 1 Bishop's Criminal Procedure, sec. 955; Wharton's Criminal Pleading and Practice, sec. 540; *People v. Harrington*, 42 Cal. 165; 10 Am. Rep. 296; *State v. Smith*, 11 Or. 205.

The case is reversed.

Scott, C. J., and Dunbar, Anders, and Gordon, JJ., concur.

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**TRIAL—CONTINUANCE ON ACCOUNT OF ABSENT WITNESSES.** To entitle a party to the postponement of a trial on the ground of the absence of witnesses, three things are necessary: to satisfy the court that the persons are material witnesses, to show that the party applying has been guilty of no laches nor neglect; to satisfy the court that there is reasonable expectation of his being able to procure their attendance at the future time to which he prays the trial be put off: *Hyde v. State*, 16 Tex. 445; 67 Am. Dec. 630, and note. See monographic note to *Stevenson v. Sherwood*, 74 Am. Dec. 141-151.

**TRIAL—TRYING PRISONER IN SHACKLES.**—A prisoner is entitled to appear for trial, upon his own plea of not guilty, free from all manner of shackles or bonds, unless there is danger of his escape: *People v. Harrington*, 42 Cal. 165; 10 Am. Rep. 296. Compare *Matthews v. State*, 9 Lea, 128; 42 Am. Rep. 667; *State v. Lewis*, 19 Kan. 260; 27 Am. Rep. 113, and note.

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## COOK v. MOODY.

[18 WASHINGTON, 114.]

**CORPORATIONS — INSOLVENCY—PREFERENCES.**—All property of an insolvent corporation is a trust fund for the benefit of all its creditors.

**CORPORATIONS — INSOLVENCY — PREFERENCES.**—A mortgage executed by an insolvent corporation to a creditor with knowledge of such insolvency, to enable the corporation to continue business and pay its debts by means of the extension of time of payment thus secured, constitutes a preference which may be avoided by either prior or subsequent creditors of such corporation.

E. C. Million, for the appellant.

J. K. Chambers, for the respondent.

**115** SCOTT, C. J. This action was brought in the nature of a creditor's bill to wind up the affairs of the Belfast Shingle Company, a corporation, and cancel a mortgage on its property held by appellant, on the ground that an illegal preference had been given over the other creditors of the company, and resulted in a decree adjudging it insolvent, appointing a receiver therefor, and setting aside the mortgage and sale thereunder. The appeal is taken from that part of the decree holding the appellant's mortgage invalid. The evidence is not brought here, and the contention is, that the decree is not supported by the findings.

It appears from the facts found that in April, 1896, said company was indebted to various creditors in about nine thousand one hundred dollars, including a twelve hundred dollar purchase price mortgage on its machinery. At that time the mortgage in question was given to secure the payment of four thousand eight hundred dollars of its indebtedness, which amount of claims appellant held as trustee for the owners thereof, the officers of the company representing at the time to appellant that the company was indebted (outside of said twelve hundred dollars mortgage and the claims secured by the mortgage then given) in only the sum of one thousand dollars, when in fact such indebtedness was much more than that as stated, and the known liabilities of the company then exceeded its assets, of which fact appellant had notice; but the officers of the company and appellant believed that by extending the time of payment of said four thousand eight hundred dollars for one year the company could pay its other debts and be able to operate its mill and carry on its business. The court found that no fraud was intended by appellant or the company, but also found that at the time of the execution of said mortgage said company **116** was unable to pay its debts in the ordinary course of business affairs and was insolvent, and would have been compelled to shut down its mill and cease doing business had it not been for the execution of said mortgage and the obtaining of the extension of time of payment of the indebtedness thereby attempted to be secured, all of which was well known to the said C. S. Moody. The company continued to operate its mill until November 15th following, when it shut down and has not done business since. On December 14, 1896, appellant began an action to foreclose his mortgage, and, there being no defense interposed, he by de-



fault took a decree of foreclosure, and had an order of sale issued and the property sold at public auction, he being the purchaser. The mortgage covered all the property the company owned. The company was indebted to the respondent at the time the mortgage was given, and she continued in its employ for some months thereafter. Payments were made to her from time to time, but at no time did the aggregate of such payments equal the amount of her claim.

Appellant contends that, there being no fraud in fact attending the giving of the mortgage, and as he had foreclosed it and purchased the property before the respondent's suit was instituted, the decree should have been in his favor. But the claims secured by his mortgage were of no higher standing than respondent's, nor, for aught that appears, than that of the other unsecured indebtedness. Appellant then knew that the company was insolvent, and its property was a trust fund for the benefit of its creditors. The mere belief that the company might be able to continue its business and pay off its other indebtedness could not alter the legal status of the property and entitle these antecedent debts attempted to be secured by the mortgage to a preference payment, in view of the fact that the respondent's <sup>117</sup> action was promptly commenced after the foreclosure. Had there been an unreasonable delay in this, another question might be presented. As it is, there is nothing in the case to take it out of the general rule, holding such property a trust fund for the benefit of all the creditors, adopted in the numerous cases heretofore decided by us.

A further contention is made to the effect that the decree should at least be modified to the extent of providing that only those claims in existence at the time the mortgage was executed should be entitled to be placed upon the same basis as those secured by the mortgage. But there is no just reason for making any such distinction here. The appellant was willing that the company should continue its business, knowing its insolvent condition, and the further indebtedness incurred in so continuing it is in equity as much entitled to payment as the prior claims. While the subsequent claimants were charged with notice of the mortgage after it was recorded, they had as much right to presume that the company could eventually pay its indebtedness as appellant had.

Affirmed.

Reavis and Dunbar, JJ., concur.

Gordon, J., dissents.

**CORPORATIONS—INSOLVENCY—PREFERENCE OF CREDITORS.**—The mere insolvency of a corporation does not of itself transform its assets into a trust fund for the equal benefit of all its creditors. Where a corporation, though insolvent, has control and possession of its property, it may, in the absence of fraud or statutory restriction, prefer a bona fide creditor by a deed of trust on its property or by a mortgage, sale, assignment, or otherwise: *Monographic note to Buck v. Ross*, 57 Am. St. Rep. 76, 77. The trust fund doctrine, as approved in the principal case, is settled by a unanimity of authority: *Note to Sabin v. Columbia Fuel Co.*, 42 Am. St. Rep. 767. See *Fowler v. Bell*, 90 Tex. 150; 59 Am. St. Rep. 788, and note.

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## BANK OF BRITISH COLUMBIA v. JEFFS.

[18 WASHINGTON, 135.]

**INTEREST—EFFECT OF PAYMENT OF IN ADVANCE.**—If a creditor, without inadvertence or mistake, receives a payment of interest in advance on a note of his debtor, and does not expressly reserve the right to sue before the expiration of the period for which interest is taken, a contract is thereby created to extend the time of payment during the period for which the interest is paid.

**INTEREST—PAYMENT OF IN ADVANCE—FORBEARANCE TO SUE.**—A contract to forbear to sue, arising from the payment and acceptance of interest in advance, is not avoided by the fact that it had been the custom of the debtor to pay interest from month to month, sometimes in advance and sometimes not, and that at the time of the payment in dispute there had been no request for an extension of time by the debtor, nor reservation by the creditor of the right to sue.

Burke, Shepard & McGilvra and H. B. Huntley, for the appellant.

T. B. Hardin and P. P. Ferry, for the respondent.

<sup>137</sup> GORDON, J. This is a second appeal. The case is fully stated in *Bank of British Columbia v. Jeffs*, 15 Wash. 230. The present appeal is from an order, made on motion of the defendant at the close of the trial, discharging the jury and directing judgment for the defendant. The law of the case was stated on the former appeal as follows: "Where a creditor, without inadvertence or mistake, receives a payment of interest in advance on the note of a debtor, and does not expressly reserve the right to sue before the expiration of the period for which interest is taken, there is a contract created to extend the time of payment during the period for which the interest is paid." We think the question involved in this appeal falls within the rule above announced.

The testimony on the part of appellant at the trial tended to show that at the time interest was received upon the note in

suit there was no request made for an extension, that there was no conversation upon the subject, that it had been the custom of the defendant Alvord to pay interest upon the note from month to month, that in some instances payment of such interest was not made until a day or more after the end of the month, and that such interest payments were always made by check upon appellant's bank, in which Alvord had a personal account. Sometimes checks for such payments were mailed to the bank, and at other times presented at the counter.

On May 24, 1893, Alvord made his check in favor of the bank for eighty-six dollars and seventy cents, the check containing upon its face this indorsement: "On account of interest for the month of May, 1893." On the same day it was received, stamped "Paid," the amount charged to the account of Alvord, and the note indorsed: "Interest paid to May 31st, 1893." Whether this particular check was presented at the counter <sup>138</sup> of the bank or received in the course of mail does not appear from the evidence. None of the witnesses for the bank had any personal recollection on the subject. The only question, therefore, for our consideration is whether the contract for extension, which the law implied from the fact that interest in advance was paid and received, was overcome by the proof already referred to. It is appellant's contention that the payment of interest in advance created at most a mere presumption, and was in itself merely prima facie evidence of an agreement to extend, which is overcome in the present case by the proof of the silence of the parties, the absence of any request for extension and the course of dealing between the parties. With this contention we are unable to agree.

It is not made to appear in any way by the evidence in this cause that the interest was received by the bank through any mistake. The check upon its face stated the purpose for which the money was to be applied, viz., for interest for the month of May; nor is the purpose for which the bank received the payment left uncertain by the proof. It is not reasonable to suppose that the maker thought he could be sued upon the note during the period for which his interest was paid in advance. Nor is it to be supposed that the bank considered that it might maintain an action until the expiration of the period for which it had received the interest.

In Crosby v. Wyatt, 10 N. H. 318, the court say: "Where an individual pays interest upon a note in advance, he does so for the purpose of procuring delay; and it is believed that it is



generally understood between the parties, unless there is some express reservation, that the creditor has no right to call for the principal, until the expiration of the time. . . . The payment of the interest is the consideration of such an agreement, implied from the transaction itself, if not distinctly expressed. The sum <sup>139</sup> received is a payment, not of a part of the principal, or generally, but, specially, of interest, for a certain period. And why is this payment made? Clearly to obtain the delay, and for nothing else. The very idea of a payment of interest in advance presupposes that delay of payment of the principal is to be given for the time. The interest thus paid is not expected to be applied afterward to the principal, or paid back on any contingency, unless there is some agreement of the parties to that effect. Nor are we aware of any principle upon which the maker, after such a payment of interest in advance could before the expiration of the time, on offering to pay the balance, require the creditor to apply any portion of the interest so paid, in discharge of the principal. . . . The general rule, of course, does not apply where, on the payment of interest in advance, liberty to sue is reserved."

Upon similar facts in *Wakefield Bank v. Truesdell*, 55 Barb. 604, Justice Foster, speaking for the supreme court of New York, says: "He [the cashier of the bank] should have declined to receive the interest at all, or have informed Thompson that he should reserve the right to collect the note at any time. He, however, took the money and indorsed it as interest on the note; not as principal, nor generally, but as interest up to the 26th of February, 1856. And is it not clear that he intended to wait till that time for the principal?"

In *Woodburn v. Carter*, 50 Ind. 376, it is said: "The inference is irresistible that where a creditor receives a payment of interest in advance on his note from the debtor, there is a contract to extend the time of payment during the period for which the interest is paid."

The case of *Preston v. Henning*, 6 Bush, 557, presents facts very similar to those in the present case. In that case the holder of the note, in receiving the interest, gave a receipt for it as general payment. The court say: <sup>140</sup> "Although it appears from the testimony of Speed that he did not intend in accepting it to release the appellant, and that he gave the credit and receipt for it as a general payment, under the advice of his counsel, in order that the transaction might not have that legal effect, he, in

fact, received the money as interest paid in advance; . . . . while, therefore, it appears that the appellees did not intend that their receipt of the three hundred dollars, nor any of the other payments, should have the legal effect of releasing the appellant, we cannot resist the conclusion that all the payments made were of interest in advance; and it is equally clear that these payments were made by John Preston in consideration of forbearance which, if not expressly promised, it was understood by him would be given. . . . . The prepayments of interest being made as the price of indulgence, and received by the appellees with knowledge of that fact, and without notice to the payer that the forbearance thus paid for would not be given, they were bound by an implied promise to forbear to sue until the expiration of the time for which the interest was paid."

In *People's Bank v. Pearsons*, 30 Vt. 711, the supreme court of Vermont say: "To the question, Why was this interest paid in advance? there can be but one reply. It was to obtain the delay, and for nothing else, and the payment of interest in advance necessarily presupposes that a delay of payment of the principal for the time is to be given."

In *Hamilton v. Winterrowd*, 43 Ind. 393, it is said: "The payment of interest in advance by a debtor to the creditor, the latter receiving it as such, implies an agreement for forbearance during the time for which such interest is paid, unless there is some agreement or understanding to the contrary."

In the present case, no part of the sum paid was intended to be applied on the principal—no part of it was so applied—it was accepted by the appellant as interest to a future date, so indorsed on the note, and there is not a word or line <sup>141</sup> of testimony indicating that the right to sue or otherwise enforce payment prior to the expiration of the time for which interest had been received was reserved by the bank. The present case may be, and we think is, an extreme one. The prepayment was for a period of six days only, but that can make no difference; it rests on principle, and the result is the same, whether the extension is for a day or a year. It was argued by the very able and distinguished counsel for appellant, both at the bar and in the brief, that the receipt of the interest was merely *prima facie* evidence of a contract to extend, which may be overcome by the circumstances surrounding the cause. But to hold that the mere silence of the parties, the absence of any request to extend, and the like, are circumstances which overthrow the presumption, would be

equivalent to holding that the prima facie case must fail unless proof is made of an express agreement to extend.

The judgment appealed from will be affirmed.

Scott, C. J., and Dunbar, Anders, and Reavis, JJ., concur.

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**INTEREST—PREPAYMENT—FORBEARANCE TO SUE.**—The taking of interest in advance on a note is, in the absence of any agreement to the contrary, prima facie evidence of an agreement to forbear collection of the note during the period for which interest has been paid: *Skelly v. Bristol Sav. Bank*, 63 Conn. 83; 38 Am. St. Rep. 340. But the cases in which payments of either principal or interest have been made before they were due are comparatively few, unless there has been an express stipulation by which the debtor was to derive some special benefit: *Monographic note to Hart v. Dorman*, 50 Am. Dec. 289.

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## SHUEY v. ADAIR.

[18 WASHINGTON, 188.]

**AGENCY—UNDISCLOSED PRINCIPAL — PAROL EVIDENCE TO ESTABLISH AGENCY.**—A maker of a note, with nothing on its face to disclose that he is an agent cannot, when sued thereon, introduce parol evidence to exonerate himself from liability by showing that in executing the note he acted only as agent and signed it under an agreement with the payee that the principal alone should be bound.

**AGENCY—UNDISCLOSED PRINCIPAL—PARTIES.**—The sole maker of a note, with nothing on its face disclosing his agency, is not entitled, when sued thereon, to have his alleged principal made a party defendant on the ground that he signed the note as an agent only.

**NEGOTIABLE INSTRUMENTS — SUBSTITUTION OF NOTE AS DEFENSE.**—The maker of a note is not released from liability thereon by an agreement, made after its maturity, between the payee and a third person for the substitution of the latter's note for it, when such agreement is without consideration and remains unexecuted.

**NEGOTIABLE INSTRUMENTS—PLEADING.**—The plea of a maker of a note that its execution is without consideration is insufficient, when such defense can only be established by parol evidence showing that such maker executed the note as agent.

McCutcheon & Gilliam, for the appellant.

Clise & King, for the respondent.

<sup>189</sup> DUNBAR, J. The appellant executed to the Seattle Savings Bank the following note:

"\$2000.00.

Seattle, Wash., May 6th, 1892.

"One year after date, without grace, for value received, I promise to pay to the order of the Seattle Savings Bank, at the banking-house of said bank, in the city of Seattle, the sum of



two thousand dollars, with interest at the rate of ten per cent per annum payable semi-annually from date hereof until paid. And if suit shall be commenced for the recovery of any amount due upon this note, I agree to pay an attorney's fee of fifty dollars.

"No. 230.

GEO. B. ADAIR,

"Due May 6th, 1893.

P. O. Address, City."

This note was discounted by the bank to Ballard, Rinehart, Holmes, and Robertson, and the proceeds thereof, the sum of two thousand dollars, was paid by the bank to the above-named parties. In course of time, after the maturity of the note, the bank sued the appellant, the maker of the note. The essential parts of the amended answer were as follows:

"3. That at the time said note was so discounted as aforesaid, and in consideration thereof, and of the payment of the said proceeds to them, said Ballard, Rinehart, Holmes, and Robertson agreed to and with said bank and this defendant that they, the said Ballard, Rinehart, Holmes, and Robertson, would, within a few days thereafter, take up the said note and pay the amount thereof to said bank.

<sup>190</sup> "4. That at and before the discount of said note as aforesaid, said bank well knew that the same was made and executed by the defendant so as aforesaid for and in behalf of said Ballard, Rinehart, Holmes, and Robertson, and not otherwise, and that the proceeds thereof were to be used by, and for the sole benefit of the said Ballard, Rinehart, Holmes, and Robertson, and that it was discounting the same for, and for the sole benefit of, the said Ballard, Rinehart, Holmes, and Robertson, and the said defendant received no part of the consideration thereof. And the said bank then and there agreed to and with defendant and said Ballard, Rinehart, Holmes, and Robertson that it, the said bank, would look to the said Ballard, Rinehart, Holmes, and Robertson for the payment of said note, and that this defendant should never at any time be held by said bank liable upon or for the note so made by him as aforesaid nor be called upon to pay the same. And the said bank, pursuant to said agreement, has never asked said defendant to pay said note or any part thereof, but on the contrary has at all times held the said Ballard, Rinehart, Holmes, and Robertson liable and responsible to it to pay the same pursuant to the said agreement so made as aforesaid when said note was discounted by it.

"5. That there was no other consideration for the note upon which this action is brought, and no part thereof was received by defendant or any other person for him, as is hereinabove

stated, all of which was well known to said bank at and before it discounted said note.

"6. Defendant, further answering, says, that since he so made and executed said note he has frequently demanded of said Ballard, Rinehart, Holmes, and Robertson, that they pay and take up the said note so made by the defendant as aforesaid, and that they frequently promised him they would do so, but have neglected to carry out their said promise and agreement to and with defendant and said bank.

<sup>191</sup> "7. Defendant, further answering, says that about two years after said bank had so discounted said note as aforesaid, it, said bank, entered into an agreement to and with the said Ballard, Rinehart, Holmes, and Robertson that it would accept the note of said Ballard, Rinehart, Holmes, and Robertson for the amount of and in place of the said note so discounted by it for the said Ballard, Rinehart, Holmes, and Robertson as aforesaid, and that the said Ballard, Rinehart, Holmes, and Robertson thereupon agreed to and with said bank that they would make, execute and deliver to said bank their note for the said amount and take up and deliver to defendant said note so discounted for them."

The plaintiff interposed a general demurrer to the said affirmative defense, which demurrer was sustained by the court. Appellant, standing upon his answer, moved the court for an order to bring in the said Ballard, Rinehart, Holmes, and Robertson as necessary and proper parties to this action, which motion was overruled by the court, and judgment was entered, as prayed, for plaintiff and against defendant. From such judgment an appeal is taken to this court.

So that it will be seen that this case involves the question whether an agent who executes a promissory note for his principal can introduce parol evidence to exonerate himself from responsibility; for it may be conceded that paragraph 4 of the answer is sufficient to raise this question.

It is contended by the appellant that the authorities sustain this rule, while the respondent contends that the case falls squarely within the rule that the terms of a written contract cannot be contradicted by parol evidence. Many cases have been cited by the counsel for appellant, all of which we have carefully examined, and it must be said that upon this important question there is at least an apparent conflict of authority, and the expressions of different courts <sup>192</sup> are somewhat bewildering. But while there were expressions used by the courts in

some of the cases cited by the appellant which would seem to sustain his contentions, yet, when the case itself is examined, the decision in most of them will be found to be based upon a state of facts unlike the state of facts disclosed by the answer in this case; and most of them fall within one of the three following principles, which seem to be well established, viz: 1. Where the check or order drawn by the agent discloses the principal; 2. Where there is enough on the face of the written instrument to render it doubtful whether it was the intention to bind the agent or the principal; and 3. Where the instrument was to be delivered upon the taking effect of some future stipulated condition, and it has been delivered before such condition is performed. In each case parol evidence is admissible to show the actual contract; as, for instance, the first case cited by appellant, viz., *Brockway v. Allen*, 17 Wend. 40, a case which has been cited by many of the subsequent cases, falls within the first rule announced. A note was given by the trustees of the First Baptist Church and Society of the village of Brockport. This society was indebted to the plaintiff for materials furnished to the society, and on account of such indebtedness the note was executed. The trustees signed the note individually, adding "Trustees of Baptist Society." In that case it was held by the supreme court of New York that the principal was bound and not the agent; but the court gives as the reason of its decision that the fact of the agency substantially appeared on the face of the note.

In *Whitney v. Wyman*, 101 U. S. 392, there are some expressions, as we have before indicated, used by the court, which, if applied to the general proposition, would support appellant's contention; as for instance, that the question is always one of intent, and the court, being untrammelled <sup>193</sup> by any other consideration, is bound to give it effect. It is also said: "The intent developed is alone material, and when that is ascertained it is conclusive. Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so."

The whole case, however, shows that the order for machinery plainly indicated that the same was ordered for the use and benefit of the company, the Prudential Grand Haven Fruit Basket Company. As in the case above mentioned, the agent's name alone was signed to the order, but to it was added "Prudential Committee Grand Haven Fruit Basket Company." And while it is true that these words are merely *descriptio personarum*, yet it brought the case within the rule announced above, that



there was sufficient on the face of the order to disclose the principal, or at least to render ambiguous the meaning of the order so far as the responsibility was concerned.

In *Hill v. Ely*, 9 Am. Dec. 376, the syllabus of the case was as follows: "In an action by an indorsee against the indorser of a note in blank, parol evidence is admissible to show that at the time of the indorsement the indorsee agreed that he would not have recourse upon it against the indorser; and that the note so indorsed was delivered upon that express condition."

The court in its opinion says: "The notes of Jabez Lamb were drawn in favor of William Hill, and by him handed to Elisha Ely, without indorsement. Elisha Ely then said, 'Hill, you must indorse these notes,' to which Hill replied, 'That is not our understanding.' Elisha Ely rejoined, 'They are made payable to you; how will you convey them to me? You must indorse them in order that I may collect them.' William Hill then <sup>194</sup> said, 'I indorse them, but remember, I am not to be held responsible for the payment by this indorsement'; and Elisha Ely accepted the notes on that condition."

This case was especially decided by the court on the ground of actual fraud, and, as will be readily perceived from the statement given by the court, the transaction was actually fraudulent; and as a matter of course the defense of fraud or mistake is always available.

The case of *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326, was a case where there was an ambiguity on the face of the instrument, which was a check, and which falls within the second rule, *supra*. The court, after arguing this case, says: "But it is enough for the purposes of the defendant to establish that there existed, on the face of the paper, circumstances from which it might reasonably be inferred that it was either one or the other," having reference to the question whether it was the check of the party who signed or whether the check was given for the benefit of the bank.

*Michels v. Olmstead*, 14 Fed. Rep. 219, is another case where the want of the happening of some future condition provided for was pleaded in exoneration of the agent. In this case, the agreement stipulated for machinery to be furnished by the plaintiff to the defendant at specified prices, and the defense was, that it was the understanding at the time the contract was made that the defendant, who had signed the contract, was not to be held liable personally in the event the corporation, for which the machinery was ordered, was not formed; but the court recog-

nized and stated the principle that: "The contract read in evidence must be taken to set out the whole of the agreements of the parties, and no change of it can be made by verbal testimony, unless the instrument itself shows on its face that certain matters pertaining to it <sup>195</sup> are left undetermined, and, when this is the case, testimony may be admitted to complete the contract, so to speak."

But that is an entirely different proposition from the one at bar, where the conditions of the contract are absolutely and plainly disputed, and one defendant is sought to be substituted for another without any future conditions agreed upon not having been complied with, and without any indication or ambiguity on the face of the note as to who the actual payor was.

The next case cited, *Dix v. Akers*, 30 Ind. 431, we think has no bearing on the subject in controversy, and the same might be said of *Rawlings v. Fuller*, 31 Ind. 255. It simply decides that: "One who contracts merely as the agent of another, and has no personal interest in the contract, is not the trustee of an express trust within the meaning of the statute, and cannot, under the code, sue on such contract in his own name."

There was no promise to pay the rent here to Fuller, and no claim of title whatever in Fuller to the property, and the complaint expressly stated that the property belonged to Sarah Floyd.

*Small v. Smith*, 1 Denio, 583, is another case of fraud, where a note was indorsed under an agreement that it should not be deposited until a future condition had been complied with. And the court especially found that it was clear that the note was delivered in violation of the agreement on which it had been indorsed by the defendant.

The case of *Kost v. Bender*, 25 Mich. 515, simply decides that: "The general rule, that a purchaser from a bona fide holder of negotiable paper, takes with it all the rights of such holder, whether he has notice of any infirmity, as between the original parties or not, is subject to the exception that, when the payee becomes such purchaser, he takes it <sup>196</sup> subject to all equities and defenses originally existing against it."

We do not think that the citation from *Randolph on Commercial Paper*, section 1875 et seq., states the rule contended for by the appellant, although it is somewhat difficult to determine what the author's views are on this particular point. In substance, the announcement is, that the general doctrine is now that where the purchaser takes a general bill or note with notice, he is sub-

ject to defense like the payee; thus, the maker may set up against such holder that he had retired from the partnership before the firm note was delivered; or that the note was given especially on condition of another surety being added, a proposition which we have discussed above; or that the consideration was illegal; or on conditions as to purchase of goods or other consideration; or he may show that the note was obtained by fraud, or he could show that it was for accommodation for a particular purpose, which had failed or been disregarded; or that the accommodated party had fraudulently diverted the paper; but the announcement is made that the mere fact of its being accommodation paper constitutes no defense, even against a party with notice. While the note in question, according to the answer, is not technically accommodation paper, not being made for the benefit of the payee, it was really for the accommodation of Ballard, Rinehart, Holmes, and Robertson, and the same reasons, it seems to us, would apply for making the fact of its being drawn for the accommodation of the parties mentioned above no defense, even against a party with notice, as, for instance, the payee in this case.

Edwards on Notes and Bills, page 316, is not very definite on this subject, but what is said we think must be construed rather against the contention of the appellant.

<sup>197</sup> Murray v. Reed, 17 Wash. 1, simply decided that: "Where a note is executed with an agreement that a new one shall be substituted when the exact amount of the debt is ascertained, a subsequent delivery of the new note to the payee renders the original note unenforceable in the hands of one who purchased the same after maturity with notice of the agreement": Citing 3 Randall on Commercial Paper; Small v. Smith, 1 Denio, 583. This is simply the announcement of the admitted doctrine that one who purchases a note after its maturity takes it subject to any equities which really existed in its favor. We can scarcely see what application it has to the case at bar.

Merchants' Exchange Bank v. Luckow, 37 Minn. 542, is not in point on the question under discussion, but was probably cited to support the next proposition, viz., that the receiver in this case stood in no different relation to the appellant than did the bank, a proposition which is, we think, indisputable.

The case of Metcalf v. Williams, 104 U. S. 93, is another case where the instrument upon its face was ambiguous as to who was the actual payee, and it was decided by the court on that proposition, and the court cites the case of Kean v. Davis, 21 N. J. L.



683, 47 Am. Dec. 182, in regard to which case it says: "The court of errors and appeals of New Jersey, in an elaborate opinion by Chief Justice Green, decided that parol proof was admissible to show that the bill was the bill of the company, and not of the defendant individually; and held that, although where a written instrument is not ambiguous or uncertain on its face, parol proof cannot be resorted to to show what was the real intention of the parties; yet, that in cases of ambiguity on the face of the instrument, as in that case, it might be introduced to explain <sup>198</sup> which of two doubtful constructions was the intent of the parties."

Merchants' Exchange Bank v. Luckow, 37 Minn. 542, is another case where the defense was that the written instrument was to become operative only on the happening of some contingent future event, as on its being signed by some other person, and falls within the rule above mentioned; and cites Michels v. Olmstead, 14 Fed. Rep. 219, deciding that: "It is always admissible to show by parol that a document was conditioned on an event that never occurred." Nothing else is decided in this case.

The case that most nearly sustains the construction claimed by appellant is a Pennsylvania case: Roberts v. Austin, 5 Whart. 313; and it may here be said that the Pennsylvania cases are generally quoted as sustaining the doctrine that parol evidence may be introduced to release a payor of the responsibility of payment where it can be shown that he signed as agent with the knowledge of the payee, but we think these cases, as we shall hereafter show, have been misunderstood. In this case the defendant gave the following note:

"Dolls. 137.50. Kensington, Philada., October 1st, 1836.

"Four months after date, pay to the order of Mr. Charles B. Austin, agent of the Union Glass Works, one hundred and thirty-seven dollars and fifty cents, for value received, and charge the same to the account of, yours, &c., Wm. Roberts, Jr.

"Mr. Richard Jukes, Newark, N. J."

Across the face was written, "Accepted, for Richard Jukes, Richard Jukes, Jr." Indorsed, "Chas. B. Austin, agt. Union Glass Works." The affidavit of defense showed that the payor was the agent for Richard Jukes, and purchased <sup>199</sup> merchandise for which this note was given, that the name of the principal was disclosed to the plaintiff before the time of said purchase, and that the said merchandise was furnished to the said principal upon the credit and for the use of this said principal, and averred that he had received no consideration whatever for said bill. The district court, after argument, gave judgment for the plaintiff

for want of a sufficient affidavit for defense, and it was taken to the supreme court of Pennsylvania on a writ of error. There is no argument by the attorneys reported in this case, and the opinion is exceedingly meager, the argument of the opinion principally going to the question of the real meaning of the affidavit rather than its legal effect.

The case of *Milligan v. Lyle*, 24 La. Ann. 144, is another meager case, where it was held that an agent who had given a draft for his principal was exonerated upon showing that he was simply an overseer upon a plantation, and that the parties in whose favor the draft was given for work knew that they were working for the principal and not for the agent.

The case of *Westman v. Krumweide*, 30 Minn. 313, is another case deciding that: "Parol evidence is admissible to show that a contract not under seal, delivered by the maker to the party in whose favor it runs, was not intended to be operative as a contract from its delivery, but only on the happening of some future contingent event."

*Neaves v. North State Min. Co.*, 90 N. C. 412, 47 Am. Rep. 529, is evidently a miscitation, as the case is not reported in that volume.

The appellant also cites *Mechem on Agency*, section 449, and cases cited. We think the section cited sustains the announcement that we have made. It is simply that: "Where an agent has entered into a contract which in terms charges himself, parol evidence is not admissible to <sup>200</sup> discharge him by showing that he intended to charge the principal, although it is admissible to show that it was the intention to charge himself personally, but where the contract bears upon its face evidence that the person signing was in fact an agent, and where the contract is so framed as to render it uncertain whether the agent or the principal was intended to be bound, parol evidence may be received to show that it was the intention to bind the principal and not the agent." And it is shown conclusively in the opinion of the author that evidence of this kind is not admissible for the purpose of contradicting the express provisions of a contract. He proceeds: "But although parol evidence may not be admissible to release the agent, it may be made use of to charge the principal. Thus the principal, as will be seen hereafter, may be charged as such by parol evidence upon a simple contract made by his agent, even though the contract gives no indication on its face of an intention to charge any other person than the signer. And this doctrine applies as well to those contracts which are

required to be in writing as to those to whose validity a writing is not essential. This rule is not obnoxious to the principle which forbids the contradiction of written instruments by parol testimony, for the effect is not to show that the person appearing to be bound is not bound, but to show that some other person is bound also."

And as casting some light upon the decisions of the supreme court of the United States which are cited by the appellant in favor of his contention, and as showing how the supreme court of the United States construed the Pennsylvania cases, which are concededly the cases which support the admissibility of this kind of testimony, if they are supported by the cases at all, we cite the case of *Bast v. First Nat. Bank*, 101 U. S. 93, a Pennsylvania case appealed from the circuit court for the eastern district of Pennsylvania, and where the supreme court <sup>201</sup> of the United States would have followed the decisions of the Pennsylvania courts in a matter of this kind. There the court said, through Chief Justice Waite: "No principle of evidence is better settled at the common law than that, when persons put their contracts in writing, it is, in the absence of fraud, accident, or mistake, 'conclusively presumed that the whole engagement, and the extent and manner of their undertaking, was reduced to writing.' . . . In Pennsylvania, the stringency of this rule has been very considerably relaxed, but we have been referred to no case where, in the absence of fraud or mistake, parol evidence has been admitted to alter the plain and unequivocal terms of a written instrument. In *Martin v. Berens*, 67 Pa. St. 463, the court say: 'Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only evidence of their agreement, and we are not disposed to relax the rule. It has been found to be a wholesome one, and now that parties are allowed to testify in their own behalf, the necessity of adhering strictly to it is all the more imperative.' In this case, the Pennsylvania decisions are extensively reviewed, and the exceptions to the rule of the common law which they recognize carefully stated, but the conclusion is that 'as a general rule, it [parol evidence] is inadmissible to contradict or vary the terms of a written instrument.' Again, in *Bernhart v. Riddle*, 29 Pa. St. 96, this language is used: 'Where parties have deliberately put their engagements in writing, and no ambiguity arises out of the terms employed, you shall not add to, contradict, or vary the language mutually chosen as most fit to express the intention of their



minds. What if parol evidence prove, never so clearly, that they used such and such words in making their bargain; the writing signed, if it contain not those words, is final and conclusive evidence that they were set aside in favor of the other expressions that are found in the written instrument. . . . It is not always easy to determine when in Pennsylvania parol evidence is admissible to explain a written instrument, but in *Anspach v. Bast*, 52 Pa. St. <sup>202</sup> 356, it is expressly declared that: 'No case goes the length of ruling that such evidence is admitted to change the promise itself, without proof or even allegation of fraud or mistake. The contrary has been repeatedly decided.' To the same effect is the case of *Hacker v. National etc. Co.*, 73 Pa. St. 93, as well as many others that might be cited."

In this case of *Bast v. First Nat. Bank*, 101 U. S. 93, the judgment was assigned to the bank as collateral security for the payment of certain notes, with authority in case said notes were not paid at maturity, to sell said judgment and apply the proceeds to their payment with the provision that the bank should not, before the maturity of the notes, take measures to collect the judgment assigned without the consent of Bast. The offer was to prove a contemporaneous agreement that it should do so. The court concludes by saying: "This is a clear contradiction of the terms of the written contract, in a matter where there is no pretense of ambiguity, and where there has been no fraud or mistake," and it was not allowed.

The authorities, however, holding that this kind of testimony is inadmissible speak with no uncertain sounds. And in *Cragin v. Lovell*, 109 U. S. 194, the cases of *Metcalf v. Williams*, 104 U. S. 93, and *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326, cited by the appellant, are distinguished and shown not to come within the rule that: "Upon a negotiable promissory note made by an agent, in his own name, and not disclosing on its face the name of the principal, no action lies against the principal," a rule which is distinctly announced in *Cragin v. Lovell*, 109 U. S. 194. And this, it will be seen, goes beyond the proposition in this case, where it is simply sought to hold the alleged agent or payor, and where the payee has elected to sue the payor or maker of the note.

<sup>203</sup> In *Nash v. Towne*, 5 Wall. 689, it is decided that: "Where an agent has entered into a written contract in which he appears as principal, parol evidence is inadmissible to show, with a view of exonerating him, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed."

And the court in concluding its opinion in this case, said: "Cases may be found, also, where it is held that the plaintiff may prove by parol that the other contracting party named in the contract was but the agent of an undisclosed principal, and in that state of the case he may have his remedy against either, at his election": Citing *Thomson v. Davenport*, 9 Barn. & C. 78. "Evidence to that effect will be admitted to charge the principal or to enable him to sue in his own name, but the agent who binds himself is never allowed to contradict the writing by proving that she contracted only as agent and not as principal": Citing *Jones v. Littledale*, 6 Ad. & E. 486; 1 *Parsons on Contracts*, 5th ed., 64; *Titus v. Kyle*, 10 Ohio St. 444; 2 *Smith's Leading Cases*, 6th Am. ed., 421.

In Wood's *Byes on Bills and Notes*, page 37, the rule is stated as follows: "An agent will be personally liable to third persons on his drawing, indorsing, or accepting, unless he either sign his principal's name only or expressly state in writing his ministerial character, and that he signs only in that character; 'unless,' to use the words of Lord Ellenborough, 'he states upon the face of the bill that he subscribes it for another; unless he says plainly, 'I am the mere scribe.''" Thus, where the defendant, agent of a banker, drew the following bill: 'Pay to the order of A. B. 50 pounds, value received, which place to the account of the Durham Bank as advised,' and subscribed his own name, it was held that the defendant was personally answerable and he alone, though the plaintiff, the payee, knew that he was only agent."

<sup>204</sup> And the final announcement is made: "The rule of law as to simple contracts in writing, other than bills and notes, is that parol evidence is admissible to charge unnamed principals, and so it is to give them the benefit of the contract; but it is inadmissible for the purpose of discharging the agent, who signs as if he were principal in his own name. And the rule of law is reasonable, for in the two former cases the evidence is consistent with the instrument, for it admits the agent to be entitled or bound; but in the latter case such evidence would be inconsistent with the terms of the instrument." In support of this rule, see *Davis v. England*, 141 Mass. 587; *Wing v. Glick*, 56 Iowa, 473; 41 Am. Rep. 118; *Hypes v. Griffin*, 89 Ill. 135; 31 Am. Rep. 71; *Bank v. Cook*, 38 Ohio St. 442. Many of these cases go further than it is necessary to go to sustain the demurrer in this case: See, also, 1 Am. & Eng. Ency. of Law, 415, 416, and cases cited.

We are satisfied from such investigation as we have been able to make that the answer in this case was demurrable, and that parol evidence could not have been admitted to prove the facts

alleged in the answer. It is contended by the appellant that in any event the motion to make Rinehart et al. parties to this action should have been sustained for the reasons that the law abhors a multiplicity of suits, and that all the rights might have been determined in one action, but the plaintiff here, having a right to elect, the defendant cannot invoke this rule in this case, for it would delay the rights of plaintiff for the defendant's benefit. The plaintiff had a right to sue the real party as disclosed by the instrument itself; and having done so, if the defendant is entitled to contributions from his alleged principals, that is a matter in which this plaintiff has no interest, and his rights cannot be affected or delayed by it.

205 As to the seventh paragraph of the answer, viz., that the bank entered into an agreement some two years after the note had been discounted and evidently a year after it had become due, with said Ballard, Rinehart, Holmes, and Robertson, that it would accept their notes for the amount of and in place of the said note so discounted by it for the said Rinehart, Ballard, Holmes, and Robertson as aforesaid, and that the said Ballard, Rinehart, Holmes and Robertson thereupon agreed to and with said bank that they would make, execute, and deliver to said bank their note for the said amount, and take up and deliver to defendant said notes so discounted to them, we do not think it states sufficient. This was not done; either party could have withdrawn; it was no part of the original agreement. There was no consideration for any such contract, and there is no allegation that the new note was ever tendered. A may enter into an agreement with B that if B will tender him his note at a certain time he will deliver to B a note which A holds against C. But such agreement would be no defense in an action on the note against C, providing the agreement had not been executed. It is also claimed that in any event this demurrer should not have been sustained for the reason that the defendant pleaded want of consideration; but the want of consideration that he urges depends upon the oral testimony which he seeks to introduce in this case under his pleadings, and which we have found is not competent testimony. Consequently, the plea of want of consideration falls when the foundation for such a plea is stricken from the case.

This court has always been of the opinion that the faith and credit attaching to written agreements should not be easily destroyed, and the best of reasons could be adduced for holding a contract of this kind sacred and unchangeable by the admission



of parol testimony except, of course, in <sup>206</sup> cases of fraud or mistake. These reasons have been so often advanced by courts and law-writers, and are so well understood by the profession, that it is not necessary to repeat them here. The judgment will be affirmed.

Scott, C. J., and Reavis, Gordon, and Dunbar, JJ., concur.

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**AGENCY—LIABILITY OF AGENT CONTRACTING FOR UNDISCLOSED PRINCIPAL—PROOF OF AGENCY.**—A written contract executed by an agent must, in order to bind his principal, purport on its face to be his contract: *Clealand v. Walker*, 11 Ala. 1058; 46 Am. Dec. 238; *Stone v. Wood*, 7 Cow. 453; 17 Am. Dec. 529, and note. If an agent contracts in his own name he is personally answerable, and cannot escape liability by proving that he had a principal and intended to contract for him alone: *Monographic note to Greenberg v. Whitcomb Lumber Co.*, 48 Am. St. Rep. 917; *Argersinger v. Macnaughton*, 114 N. Y. 535; 11 Am. St. Rep. 687. Parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed: *Bulwinkle v. Cramer*, 27 S. C. 376; 13 Am. St. Rep. 645. Compare *Deltz v. Insurance Co.*, 31 W. Va. 851; 13 Am. St. Rep. 909, and note. It is a general rule that agency cannot be shown by the testimony of the supposed agent: *Note to Lawall v. Groman*, 57 Am. St. Rep. 668; *Pepper v. Cairns*, 133 Pa. St. 114; 19 Am. St. Rep. 625. See notes to *Davis v. Henderson*, 59 Am. Dec. 231; *Bank of Rochester v. Monteath*, 43 Am. Dec. 684, 685.

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## ORDWAY v. DOWNEY.

[18 WASHINGTON, 412.]

**MORTGAGES—ORAL AGREEMENT TO ASSUME—BURDEN OF PROOF.**—An oral agreement by a grantee to assume and pay a mortgage on the granted premises is enforceable as a contract independent of, and additional to the deed, but the burden of proof is on the party setting up such contract to establish it by a clear preponderance of the evidence which must be clear, satisfactory, and convincing. He is not entitled to recover if the evidence is equally balanced.

J. B. Murphy and Blaine & De Vries, for the appellants.

G. Fowler, for the respondent.

<sup>412</sup> GORDON, J. In the year 1890 Gotthard Grot and wife, owners of certain real property situated in King county, in order to secure their promissory note for the sum of two thousand two hundred and seventy-five dollars, executed a mortgage upon said premises in favor of Thomas S. Krutz, who thereafter, for value, assigned said mortgage and the note secured thereby to the respondent Ordway. Subsequent to the execution of the mort-

gage <sup>413</sup> Grot and wife sold the premises to respondent Christ R. Frasch by a deed of conveyance, which contained the following clause, following the description of the premises conveyed, viz: "To have and to hold unto the said Christ R. Frasch and to his heirs and assigns forever, as his sole and separate property and estate, the same being conveyed as a gift to said Frasch by his mother, said Helen Grot. Said Frasch does, nevertheless, hereby assume and agree to pay off and discharge any and all encumbrances that are now liens upon the aforesaid real estate."

Frasch and wife thereafter, and prior to the commencement of this action, conveyed the premises by a deed of general warranty to the appellant Patrick Downey. The deed from Frasch and wife to the appellant recites the consideration of five thousand dollars gold coin of the United States, and further recites that the conveyance is made "subject to that certain mortgage of two thousand two hundred and seventy-five dollars executed by Helen Grot and her husband to Thomas S. Krutz, September 1, 1890, and payable September 1, 1895, interest payable thereon on the first days of March and September." The debt secured by the mortgage having matured and remaining unpaid, respondent Ordway commenced this action to foreclose the mortgage, and made the appellants Patrick and Victoria M. Downey defendants therein, under an allegation of the complaint to the effect that appellants had assumed and agreed to pay said mortgage, and in the complaint a personal judgment was asked against said appellants for the amount due upon the note.

There is no assumption clause contained in the deed, but upon the trial of this action, over the objection of the appellants, plaintiff was permitted to introduce parol testimony for the purpose of showing that, as a part of the consideration for the deed of conveyance referred to, the appellants agreed with their grantors to pay the mortgage <sup>414</sup> debt. The court rendered judgment against the appellants for the full amount of the mortgage debt, and entered a decree of foreclosure, and for any deficiency. The appeal is from such judgment and decree.

The assignments relied upon for a reversal are: 1. That the court erred in permitting oral testimony tending to establish a contract to assume the mortgage debt; and 2. That the evidence was insufficient to justify the finding of the court that the appellants assumed or agreed to pay the mortgage. It is the contention of the appellants that the testimony which was admitted over their objection tended to change, add to, and enlarge the

effect of the written contract or conveyance, and that it is not permissible to establish a contract of assumption by parol.

In *Don Yook v. Washington Mill Co.*, 16 Wash. 459, we held that a promise by the purchaser of certain sawlogs, as part consideration therefor, to assume and pay the indebtedness of the seller to a third party, might be shown by parol evidence, notwithstanding the bill of sale of the logs, while expressing a good consideration, made no mention of the purchaser's promise to pay the indebtedness to such third party.

After a careful examination of the authorities, we think that while an agreement to assume the mortgage is usually established by a stipulation to that effect contained in the deed, the great weight of authority is that a verbal contract of assumption is enforceable, that it is not merged in the deed, and is not contradictory but independent of it. It is merely an additional agreement, and not at variance with the terms of the deed.

In 2 *Devlin on Deeds*, section 1073, the author says: "It is not necessary that the promise of the grantee to assume the payment of an encumbrance as a part of the consideration for which the deed is made should be in writing. <sup>415</sup> A verbal promise to do so is valid, and equity will enforce it either at the instance of the grantor or the holder of the mortgage."

And the proposition thus laid down is fully sustained by the authorities: *Strohauer v. Voltz*, 42 Mich. 444; 2 *Warvelle on Vendors*, 663; *Wiltsie on Mortgage Foreclosure*, sec. 224; *Merri-man v. Moore*, 90 Pa. St. 78; *McDill v. Gunn*, 43 Ind. 315; *Lamb v. Tucker*, 42 Iowa, 118; *Taintor v. Hemmingway*, 18 Hun, 458; affirmed, 83 N. Y. 610; *Moore v. Booker*, 4 N. Dak. 543; *Wilson v. King*, 23 N. J. Eq. 150; 1 *Jones on Mortgages*, 5th ed., sec. 750; *Drury v. Tremont Imp. Co.*, 13 Allen, 168; *Society of Friends v. Haines*, 47 Ohio St. 423. See, also, note to *Klapworth v. Dressler*, 78 Am. Dec. 84, and additional authorities there cited.

The consideration recited in the deed is "for the purpose merely of giving it effect as a conveyance, and that for any other purpose parol evidence may be given to show that the real consideration was greater or less than the sum named": Per *Cooley, J.*, in *Strohauer v. Voltz*, 42 Mich. 444. And that great judge adds that the cases holding this view "are not . . . out of harmony with the general rule which excludes parol evidence to control writings."

*Gordon v. Parke etc. Co.*, 10 Wash. 18, is not at all applicable to the question we are now considering, either upon the facts or the principle involved.



But while the agreement of assumption may rest in parol, the promise to pay must be established by evidence that is clear and conclusive, and it cannot be established by inference. In the present case, the only evidence introduced was the deeds and mortgage already referred to, and the testimony of respondent Christ R. Frasch and appellant <sup>416</sup> Patrick Downey. On behalf of the respondents, Frasch testified that as a part of the consideration for the conveyance to Downey, he (Downey) promised and agreed to pay the mortgage debt, while, on the other hand, Downey testified just as positively that he made no promise or agreement to do so. So far as the record discloses, these parties were entitled to equal credit, and their interest in the result was equal. There are no circumstances discernible which enable the court to say which one testified truthfully and which one falsely. But the burden was upon the plaintiff to establish the agreement by evidence that was clear, satisfactory, and convincing, and this we think he has failed to do.

The judgment and decree will be reversed and the cause remanded, with directions to the lower court to enter judgment dismissing the action as to appellants, with costs.

Anders, Dunbar, and Reavis, JJ., concur.

#### ON PETITION FOR REHEARING.

GORDON, J. In his petition for rehearing, counsel for the respondent urges that, assuming the evidence on the trial to be evenly balanced, this court should not disturb the findings. Ordinarily, the rule for which he contends prevails, but in this case we think the burden was on the respondents to establish the oral agreement by a clear preponderance of the evidence. *Hamar v. Peterson*, 9 Wash. 152, and *Skeel v. Christenson*, 17 Wash. 649, presented different issues, and the rule announced in those cases in nowise conflicts with the holding in the present case. Our attention is also directed to an inadvertence occurring in the opinion by which the action was directed to be dismissed as to the appellants. The intention was to reverse the judgment of the superior court only in so far as it awarded a personal judgment against <sup>417</sup> the appellants, and not to disturb the decree of foreclosure and with this modification the petition will be denied.

Scott, C. J., and Anders, Dunbar, and Reavis, JJ., concur.

**MORTGAGE—AGREEMENT TO ASSUME—FORM OF.**—An oral promise by the purchaser of land to assume and pay the mortgage thereon is sufficient and may be enforced in equity by the grantor or the holder of the mortgage: Monographic note to Klap-

worth v. Dressler, 78 Am. Dec. 84. See Bolles v. Beach, 22 N. J. L. 680; 53 Am. Dec. 263. The assumption of a mortgage debt by a purchaser of land may be shown by parol evidence: Bensieck v. Cook, 110 Mo. 173; 33 Am. St. Rep. 422.

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## SINGLY v. WARREN.

[18 WASHINGTON, 434.]

**JUDGMENTS—EFFECT OF REVERSAL ON PURCHASER.**—An execution plaintiff who holds a sheriff's certificate of sale is not a purchaser in good faith in the sense that he is entitled to retain property purchased by him under a judgment subsequently reversed. His title is divested by the reversal, and his grantee, though not a party to the action, nor cognizant of the defect in title, is not a purchaser in good faith, and acquires no greater rights than the judgment plaintiff had.

Crow & Williams and Blake & Post, for the appellant.

Graves, Wolf & Graves, for the respondents.

<sup>434</sup> **ANDERS, J.** This action was instituted by appellant to recover the possession of certain real estate in the county of Spokane. Both parties claim title through Albert English <sup>435</sup> and Sylvester S. Callahan, each of whom was formerly owner of different portions of the land. On April 28, 1894, English and Callahan sold the premises in controversy to one Rilda Grinstead, a part of the consideration being the assignment and transfer of a certain judgment held by Miss Grinstead against the South Harbor Land and Improvement Company. In September of the same year, English and Callahan sued Miss Grinstead, in the superior court of Spokane county, to enforce a vendor's lien upon the land, on account of alleged misrepresentations on her part concerning the value of the judgment aforesaid. They recovered a judgment against her in accordance with the prayer of the complaint. She thereupon appealed to this court, where the judgment was reversed on October 21, 1895, and their complaint was ordered dismissed, after a hearing upon the merits. The judgment in the lower court was rendered on June 4, 1895. Prior to that time, and while the cause was pending in the superior court, and on January 25, 1895, Miss Grinstead conveyed the land in question to one Ames, who, on February 25, 1895, conveyed it to the appellant here. It is through these conveyances that the appellant claims title. Miss Grinstead's appeal was effected on July 18, 1895, by the filing of notice of appeal and a bond for costs, which did not supersede the judgment. After the appeal had been

effected, and on July 20, 1895, the land was sold by the sheriff upon an execution issued upon the judgment to Albert English, one of the plaintiffs in that cause, for the sum of three hundred and sixty dollars, but no deed has ever been executed by the sheriff in pursuance of said sale. On September 25, 1895, and while said appeal was pending in this court, English signed and acknowledged a deed of the land so purchased by him to his coplaintiff Callahan, and the latter on the same day signed and acknowledged a like deed to the respondent Tindall.

<sup>436</sup> These deeds were not recorded until after the opinion of this court had been rendered, and were then presented for record by Callahan. The respondents, Warrens, claim to hold as tenants of Tindall. It appears from the testimony of Callahan and Tindall that the land was sold to Tindall for the sum of three thousand five hundred dollars, three hundred and fifty-five dollars of which was paid in cash at the time of the transfer, and that a debt of some ten years' standing of Callahan to Tindall, evidenced by a promissory note, was applied on the purchase price, the same amounting at that time to seven hundred and fifty dollars, and likewise an account of some fifty dollars due Tindall from Callahan on account of hogs sold. It also appears that the sum of twenty-one dollars due for grain sold Callahan, and the sum of seventy-five dollars for hay, were also applied in part payment for the land. No further payments are shown, or claimed, to have been made by Tindall before he learned of the reversal of the judgment, and the alleged final payment was not in fact made until a few days previous to the trial of this cause. Tindall testified that at the time he received his deed he had no actual knowledge of the pendency of the appeal, although he admitted that he was cognizant of the litigation, and had, or saw, copies of the pleadings in the case and the judgment of the trial court. At the time the appeal was effected, the defendant in that action filed a *lis pendens* in the office of the county auditor of Spokane county. On the close of the evidence in this case, both parties moved the court for a peremptory instruction requiring the jury to find in their favor. Appellant's motion was overruled and respondents' motion was sustained, and the court thereupon discharged the jury and gave judgment in favor of the respondents. A motion for a new trial having been made and overruled, the cause was appealed to this court. It will thus be seen that the sole question presented for our determination is, whether the respondent Tindall obtained a title by his deed from

<sup>437</sup> Callahan which was not affected by the reversal of the



judgment upon which it was based; or, in other words, whether Tindall is a purchaser in good faith within the purview of the law. Our statute provides: "If, by a decision of the supreme court, the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of the judgment or order appealed from, either the supreme court or the court below may direct an execution or writ of restitution to issue for the purpose of restoring to the appellant his property, or the value thereof. But property acquired by a purchaser in good faith, under a judgment subsequently reversed, shall not be affected by such reversal": Laws 1893, page 132, sec. 27; Ballinger's Code, sec. 6526.

And in contemplation of this section an execution plaintiff is not a purchaser in good faith in the sense that he is entitled to retain property purchased by him under a judgment subsequently reversed. His title is divested by the reversal, and the parties to the litigation are restored to the same position in which they were prior to the rendition of the judgment: *Benney v. Clein*, 15 Wash. 581.

This doctrine is in harmony with the great weight of authority outside of this state, and it is frankly conceded by the learned counsel for the respondents to be in consonance with the spirit and meaning of our statute.

"Upon the reversal of the judgment against him," says Mr. Freeman, "the appellant is entitled to the restitution from the respondent of all the advantages acquired by the latter by virtue of the erroneous judgment. The successful appellant is entitled to a restitution of everything still in possession of his adversary in specie; not the value, but the thing. If money has been collected by the plaintiff in the judgment, whether under execution or not, an action lies against him to recover it back": Freeman on Judgments, 4th ed., sec. 482. See, also, *Bank of United States v. Bank of Washington*, 6 Pet. 17.

<sup>438</sup> The contrary rule is maintained in *Bickerstaff v. Delinger*, 1 Murph. 272, and by some decisions in the state of Kentucky, beginning with *Parker v. Anderson*, 5 T. B. Mon. 451. And the same principle was asserted by Mr. Justice Field, in *South Fork Canal Co. v. Gordon*, 2 Abb. (U. S.) 479, 22 Fed. Cas. 328, and by one of the judges in the case of *McAusland v. Pundt*, 1 Neb. 211, 93 Am. Dec. 358. In no other cases that we are aware of has this rule ever been adopted. But that a stranger to the record, who in good faith, purchases land at an execution or judicial sale under a valid judgment, which has

not been superseded by the filing of a proper bond, acquires rights which are not affected by a subsequent reversal of the judgment, is a doctrine universally announced by the courts. This rule has been recognized from very early times, and the reason of it is, as stated in Manning's case, 8 Coke, 192, and many subsequent cases, that if the title obtained by the purchaser in such cases were avoided, the vendee would lose both his property and his money, and great inconvenience would therefore follow, as no one would buy of the sheriff in such cases, and execution of judgments would not be done: *Corwith v. State Bank*, 15 Wis. 289. See, also, *Woodcock v. Bennet*, 1 Cow. 734; 13 Am. Dec. 568. Our law, like the law elsewhere, permits judgments and decrees to be enforced during the pendency of appeals, unless a bond to stay proceedings is given as required by law, and the courts have always construed the law so as to inspire confidence in judicial and execution sales by protecting bona fide purchasers at such sales from loss or injury by reason of erroneous judgments or decrees. It would be unjust to require such purchasers to suffer loss on account of errors of the trial courts of which they had no knowledge, and which they were nowise instrumental in producing. And such a requirement would be contrary to the settled <sup>439</sup> policy of the law to encourage bidding at judicial sales, and to prevent the property of debtors from being sacrificed thereat: *Freeman on Judgments*, 4th ed., sec. 484; *Marks v. Cowles*, 61 Ala. 299.

But it is strenuously contended on behalf of the respondents that inasmuch as Tindall was a stranger to the judgment which was reversed, he is entitled to the same protection which is extended to a third person who is a bona fide purchaser at a judicial sale, and the following cases are cited in support of this contention: *Lovett v. German Reformed Church*, 12 Barb. 83; *McAusland v. Pundt*, 1 Neb. 211; 93 Am. Dec. 358; *Taylor v. Boyd*, 3 Ohio, 354; 17 Am. Dec. 603; *Guiteau v. Wisely*, 47 Ill. 436; *Horner v. Zimmerman*, 45 Ill. 14; *Wadhams v. Gay*, 73 Ill. 415; *McCormick v. McClure*, 6 Blackf. 466; 39 Am. Dec. 441; *McBride v. Longworth*, 14 Ohio St. 351; 84 Am. Dec. 383; *Little v. Bunce*, 7 N. H. 485; 28 Am. Dec. 363; *Bank of United States v. Bank of Washington*, 6 Pet. 16.

It must be conceded that the language used in some of these decisions affords some foundation for the respondents' contention. But it appears to us that, when considered in the light of the facts presented by the record, they do not go to the extent claimed for them on the part of respondents. In *Lovett v.*

German Reformed Church, 12 Barb. 83, the question at issue was which of two sets of individuals were the rightful officers of the corporation. The first party having by a decree of the chancellor been declared the rightful officers, under the authority given such officers by law, executed a mortgage on the corporate property. Thereafter the other party appealed from the decree of the chancellor, and it was reversed and they were restored to office. In a suit to foreclose the mortgage given while the first set of officers were acting, it was held that the mortgage <sup>440</sup> constituted a valid lien. In the course of the opinion the court remarked: "Indeed, unless the decree of a court of competent jurisdiction protects third persons, not parties to the suit, dealing with the successful party on the faith of the decree, no judgment can be of any avail until it shall have received the sanction of the highest tribunal in the land, or until the time for appealing shall have expired."

While we have no doubt of the correctness of the decision of the court in that case, we cannot agree with the observation just quoted, for it cannot be true, as stated therein, that no judgment can be of any avail until it shall have received the sanction of the highest tribunal in the land or until the time for appealing shall have expired, unless the particular parties mentioned are protected, for the reason that judgments are of avail, according to all of the decisions, in favor of third persons who become bona fide purchasers at judicial sales, and of their vendees.

The case of *McAusland v. Pundt*, 1 Neb. 211, 93 Am. Dec. 358, which is, perhaps, the strongest case cited by the respondents, can be distinguished from the case at bar by the fact that there the party claiming under the successful party to the judgment was invested with the legal title by the reception of a deed to the property in question. And, besides, the court in that case had under consideration a statute which provided that a reversal of a judgment should not defeat the title of the purchaser, which, it will be observed, is much broader than our statute; and the same may be said of *Taylor v. Boyd*, 3 Ohio, 354, 17 Am. Dec. 603, in which case it also appears that the title of the purchaser at the sale had become absolute, which, as before stated, is not the fact in this case. In that case, too, the party who purchased at the sale did so before citation in error had been served, which fact also distinguishes that case from the present one. The same <sup>441</sup> is also true with respect to the case of *McCormick v. McClure*, 6 Blackf. 466, 39 Am. Dec. 441, in



which an innocent assignee of the plaintiff in execution was permitted to hold the property purchased by him. The case of *McBride v. Longworth*, 14 Ohio St. 351, 84 Am. Dec. 383, is an exceptional one, and was so considered by the court. In that case one lienholder, a party to the action, purchased the encumbered property at a judicial sale, and the proceeds were distributed among the several lienholders, and the court refused to require such purchaser to make restitution.

*Little v. Bunce*, 7 N. H. 485, 28 Am. Dec. 363, appears to have but slight, if any, bearing upon the proposition contended for by the respondents. The case of *Guiteau v. Wisely*, 47 Ill. 436, would seem, from the language found in the opinion of the court, to have held that an innocent assignee of the certificate of purchase at a sheriff's sale was a bona fide purchaser, but in the later case of *Roberts v. Clelland*, 82 Ill. 541, the same court states, referring to that case, that it does not declare an innocent purchaser of the certificate of sale will not be affected by the reversal of the judgment or decree in favor of his assignor.

"The extent," says the court, "of that decision is, that where the assignee bought before reversal of the judgment, and obtained a sheriff's deed, his rights, like those of a third party purchasing at a judicial sale, will not be invalidated by a subsequent reversal of the judgment."

In view of what is there said, the Illinois cases cited by the respondents are of little value as authority in favor of their contention. In *Bank of United States v. Bank of Washington*, 6 Pet. 16, it is stated by the court that, as respects third persons, whatever has been done under the judgment whilst it remained in full force is valid and binding, but that this rule is not applicable in all cases is shown by the later case of *Galpin v. Page*, 18 Wall. 350, where the court held that an attorney purchasing property at a judicial sale <sup>442</sup> under a decree in proceedings in which he acted as an attorney acquired a title which was divested by the reversal of the decree.

But if it be true, as claimed, that the foregoing cases cited by the respondents justify the judgment of the learned superior court, we are nevertheless of the opinion that they are not supported by sound reason, and that they are contrary to the weight of authority. Mr. Dembitz in his work upon Land Titles, volume 2, section 164, says: "The weight of opinion gives to a purchaser from the plaintiff no greater right to hold on to his purchase than he has himself; the estate gained by the plaintiff at a sale under an erroneous judgment being held in the light of a

defeasible fee, which does not become absolute by being sold to a party ignorant of the defect."

In *Marks v. Cowles*, 61 Ala. 299, every phase of the question now under consideration was discussed with great learning and ability, both upon principle and authority, and the learned court came to the conclusion that an assignee or vendee of one who purchased under an erroneous decree in his own favor stands in the position of his vendor, and that a subsequent reversal defeats his title, and that such assignee or vendee is not entitled to protection as a bona fide purchaser, without notice and for value.

In *Bryant v. Fairfield*, 51 Me. 149, it was held that, where land was set off to a creditor in satisfaction of a judgment and the judgment was afterward reversed on a writ of error, the debtor was entitled to the land again, and he might recover it of one who purchased it of the creditor before the reversal of the judgment without notice of any defects therein. In that case the court, after having described the modes of satisfying judgments in England under writs of fieri facias, of elegit, and of capias ad satisfaciendum, said: <sup>443</sup> "In this state the creditor sues out a writ of execution that embraces them all, and he then has his election in regard to its enforcement, by a sale of chattels, an extent upon lands, or arrest of the body. If he elects to have it extended upon the lands of the debtor, his title will depend upon the validity of his judgment, and must fail upon its reversal. Anyone who purchases the land of him must run this risk; and there is no greater hardship in this than in any other case of failure of title. He may take care to be secured by the covenants in his deed; and, if he distrusts the ability of the grantor, he need not purchase": See, also, *Adams v. Odom*, 74 Tex. 206; 15 Am. St. Rep. 827; *Dunnington v. Elston*, 101 Ind. 373; *Griswold v. Ward*, 128 Ind. 389; *Reynolds v. Harris*, 14 Cal. 667; 76 Am. Dec. 459; *Delano v. Wilde*, 11 Gray, 17; 71 Am. Dec. 687; *Cummings v. Noyes*, 10 Mass. 434; *Jackson v. Cadwell*, 1 Cow. 622.

It is claimed, however, by the learned counsel for the respondents that the case of *Bryant v. Fairfield*, 51 Me. 149, and the Massachusetts cases above cited, are not authority in this case because of the difference between the extent of a debtor's land by elegit and a sale upon execution. It is conceded that when lands were extended under a writ of elegit according to the English practice, and the somewhat analogous practice in the New England states, they were restored to the judgment debtor upon a reversal of the judgment. The reason given for the

rule is, that the title of the purchaser depended upon the existence of the judgment, and was necessarily annulled by its reversal; and, for the same reason, it would seem that lands taken from the defendant by the plaintiff by virtue of an erroneous judgment ought to be restored to him upon the reversal of the judgment. A valid judgment is an essential requisite to a valid sale, and without such judgment no sale can be supported. Upon this question the supreme court of Wisconsin in the case of *Corwith v. State Bank*, 15 Wis. 289, said: <sup>444</sup> "The right of the debtor whose lands are purchased by the creditor on execution under our statute cannot be distinguished on principle from those of the debtor whose property is under extent according to the English practice. In *Goodyer v. Junce*, Yelv. 179, the distinction between a sale by the sheriff to the party himself and such sale to a stranger, is expressly noted, and it is said the latter only will be protected. If the former be the purchaser, restitution will be awarded."

And in *Marks v. Cowles*, 61 Ala. 299, the same view is expressed in the following language: "It seems to us rather a shadowy, than a substantial difference, so far as this question is concerned, between the extent of a debtor's lands by a writ of *elegit* and a sale upon writs of *fieri facias*, now that lands are subjected to sale for the satisfaction of judgments, and such writs are framed so as to confer authority to levy and sell alike goods and chattels, and lands and tenements. When lands were extended by *elegit*, the judgment was of the essence of the title—an indispensable muniment, and so it remains to-day when there is a sale and conveyance upon a writ of *fieri facias*. It must be shown to support an action by the purchaser for the recovery of the lands, or to maintain his possession, if that is assailed by the party to whose title he claims by operation of the judgment to have succeeded."

Conceding, as claimed, that *Tindall* had no actual notice of the pendency of the appeal when he purchased the lands from *Callahan*, we are of the opinion that it cannot be said, in view of the better authorities, that he was a bona fide purchaser in contemplation of law. As has already been stated, neither he nor his grantor has ever received a deed of the land, and no one can be deemed a bona fide purchaser who does not purchase the legal title: See *Rorer on Judicial Sales*, 2d ed., sec. 576; *Wilson v. Morrell*, 5 Wash. 654; *Taylor v. Weston*, 77 Cal. 534; *Reynolds v. Harris*, 14 Cal. 667; 76 Am. Dec. 459.

<sup>445</sup> A certificate of sale executed by a sheriff does not pass ti-



tle. At most it is only evidence of an inchoate estate which may or may not ripen into an absolute title. While the purchaser at a judicial sale may be entitled to the immediate possession and the rents and profits of the premises, he cannot be said to hold the title until he receives a deed in pursuance of the sale: *Hays v. Merchants' Nat. Bank*, 14 Wash. 193; *Reynolds v. Harris*, 14 Cal. 667; 76 Am. Dec. 459; *Roberts v. Clelland*, 82 Ill. 541.

In the case last cited, the court, in construing the statute relating to the assignment of certificates of sale made by a sheriff, observed that: "The construction we have indicated the statute should receive stands to reason. An innocent purchaser is one that has the legal title to property, and has paid therefor a valuable consideration, without notice of defects or vices in the title. That cannot be predicated of a mere assignee of a certificate of sale, issued to a purchaser under judicial sentence, who is chargeable with notice of all irregularities that may invalidate such sale. As was said in *Bowman v. People*, 82 Ill. 246, 25 Am. Rep. 316, such purchaser does not take the land itself by his bid, but only an incipient interest, that may or may not ripen into an absolute estate. It is simply stating a truism, to say a party cannot assign that which he hath not. Such purchaser has not the legal title to the property bought, and of course cannot assign it."

Neither, in our judgment, for the same reason, can he sell it to a third person so that the latter may hold it as a bona fide purchaser. To hold that the respondent Tindall in this case has a good title to the premises in dispute would be to hold that his grantor was able to convert a defeasible into an indefeasible estate by the mere instrumentality of a conveyance. If the owner of a determinable fee conveys in fee, the determinable quality of the estate follows the transfer: 4 Kent's Commentaries, 10.

<sup>446</sup> The respondent Tindall cannot be deemed a bona fide purchaser for value without notice for the further reason that he failed to take notice as required by law of the source and quality of the title of his vendor. In *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459, it was said that: "The grantee is charged with notice of the deeds and documents from which he derails his title. When he purchases from the plaintiffs in the execution, he is presumed to know the course of the proceedings and state of the record from which the title of his grantor proceeded, and he is presumed to know, too, that the right of the defendant is to take an appeal within the statutory period, and also the consequences of the successful prosecution of this right; and he

must be supposed to purchase with reference to these things."

And the supreme court of Indiana observed in *Dunnington v. Elston*, 101 Ind. 373, that: "Where the only title of a purchaser rests upon the judgment or decree of a court of record, inasmuch as he is bound to take notice of the source of his title, he is charged with notice of all the incidents to which the judgment is subject. He is conclusively presumed to know that the judgment may be appealed from within a limited time, or that by the payment of costs the judgment may be vacated within a time fixed by law." And the supreme court of Alabama, in *Marks v. Cowles*, 61 Ala. 299, very forcibly and clearly announced the same doctrine.

If the respondent who claims to be the owner of this land had examined the records in the office of the county auditor he would have found a deed of the land to the appellant upon the records; and if he had examined the records in the superior court they would have disclosed the fact to him that neither English nor Callahan had any title to the premises, and that an appeal was then pending which might result in overthrowing the judgment which was the foundation of all rights which his vendor claimed in the <sup>447</sup> premises. And that being so, he must abide the consequences of his own negligence. If he is the loser in the transaction between himself and Callahan, he must look to the latter for redress.

For the foregoing reasons, the judgment appealed from will be reversed and the cause remanded, with directions to enter judgment in favor of the appellant.

Gordon, Dunbar, and Reavis, JJ., concur.

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**JUDICIAL SALES—PLAINTIFF AS PURCHASER.**—A judgment creditor buying at his own sale is chargeable with notice of all irregularities, for he is not a bona fide purchaser: *Boos v. Morgan*, 130 Ind. 305; 30 Am. St. Rep. 237, and note; *Williams v. Hollingsworth*, 1 Strob. Eq. 103; 47 Am. Dec. 527. Although the contrary has been held in California: *Hunter v. Watson*, 12 Cal. 363; 73 Am. Dec. 543. Such a purchaser is presumed to have notice of all irregularities in the sale: *Caldwell v. Waters*, 18 Pa. St. 79; 55 Am. Dec. 592. And where such a sale was vacated after the purchaser had conveyed the property to third persons, such reversal was held to put an end to the title so acquired: *Stroud v. Casey*, 25 Tex. 740; 78 Am. Dec. 556. But in that case the subsequent purchasers were the attorneys for the judgment creditor: See *McAusland v. Pundt*, 1 Neb. 211; 93 Am. Dec. 358, which contradicts the principal case directly.

## CARSTENS v. LEIDIGH AND HAVENS LUMBER Co.

[18 WASHINGTON, 450.]

**APPELLATE PRACTICE—APPEALABLE ORDER.**—An order quashing a summons in effect determines the action or proceeding, and is therefore appealable.

**APPELLATE PRACTICE—EXCEPTIONS TO FINDINGS.**—If no exceptions are taken to findings of fact and conclusions of law made by the trial court in a case tried exclusively upon affidavits, such affidavits cannot be considered upon appeal, the only question to be determined being whether the findings of fact warrant the conclusions of law.

**CORPORATIONS, FOREIGN—SERVICE OF PROCESS UPON.**—Service of process upon an officer of a foreign corporation while he is casually or temporarily found within the jurisdiction does not give jurisdiction to render judgment in personam against the corporation which has no place of business or agent within the state, and has never done any business therein.

J. Kiefer, for the appellant.

Donworth & Howe, for the respondent.

**451 DUNBAR, J.** This action was brought by the plaintiff, a corporation under the laws of the state of Washington, to recover a balance of nine hundred and ten dollars and forty-three cents for goods sold and delivered to the defendant, a corporation organized under the state of Missouri. Service was had upon the president of the defendant corporation in King county. The defendant appeared specially, and moved the court to set aside and quash the service of summons, and, in support of its motion, filed the affidavit of John H. Leidigh, the president of the defendant corporation, showing that he was not a resident of the state of Washington, that on the twenty-ninth day of January, 1897, he came to the state of Washington, arriving at Seattle on February 2d, and was served with summons by the appellant in this action on the following morning.

Affidavits and counter-affidavits were filed, the case was tried upon said affidavits, and a judgment was rendered in favor of the defendant declaring the service of the summons to be void. It is contended by the respondent in its motion to dismiss that this is not an appealable order, but, whatever might be said concerning an order refusing to quash a summons, we think it is evident that an order quashing a summons in effect determines the action or proceeding and is therefore appealable under the statute.

It is objected also by the respondent that no proper exceptions were taken in the lower court to any of the findings of fact or conclusions of law made by the court, and we think this objection well taken. This case was tried as a mixed question of law



and fact, and tried exclusively upon the affidavits which were considered by the court, and the court made its findings of fact and its conclusions of law <sup>452</sup> in regular form; the findings of fact not having been excepted to, under the rulings of this court in *Rice v. Stevens*, 9 Wash. 298, *Hannegan v. Roth*, 12 Wash. 65, and many subsequent cases, the only question for this court to determine is, Do the findings of fact warrant the conclusions of law? The court found that the defendant was a corporation duly organized and existing under the laws of the state of Missouri, that it had never appointed or had any agent residing in the state of Washington for any purpose whatever, had never done or carried on any business whatever in the state of Washington, had never had any property within the state of Washington, had never had an office for the transaction of business in any county in the state of Washington, and that it did not at any time have any officer or agent residing in any county in the state of Washington upon whom process might be served against said defendant company, or any officer or agent whatever of said defendant company.

The appellant has based its argument so entirely upon the matters and things set up in the affidavits that it is of very little value to this court in determining the law governing this case, for if we were to consider the affidavits we might conclude that the transaction or sale had been made in the state of Washington, but the finding of the court is, that the defendant has never done or carried on any business whatever in the state of Washington, and that John H. Leidigh, to whom a copy of summons and complaint were delivered, was at said time only casually and temporarily in the state of Washington, and has since departed therefrom; so that the argument of appellant made on the sixteenth, seventeenth, eighteenth, nineteenth and twentieth pages of its brief in relation to the purpose for which Mr. Leidigh came to this state and the capacity in which he was acting is not in point in the discussion of this case. We think from <sup>453</sup> an investigation of the cases cited by the appellant that it has confused the idea of jurisdiction of states over foreign corporations with the idea of a proper service. It is not questioned by any of the cases that we have seen that where a summons has been served upon an officer of a corporation for whose acts the corporation is bound, where the statute provided for a legal service on such agents or parties, the jurisdiction of the state court over foreign corporations attached. But in this case it does not appear to us that service was made under the statute, or in any

other way that has ever been maintained by any court, viz., by serving an officer of the foreign corporation which had no place of business in the state and which had never done any business in the state, such officer being simply temporarily present in the state. And most of the cases cited by appellant, as we before indicated, are cases simply sustaining jurisdiction under statutes which provided for legal service.

It is true that *Hiller v. Burlington etc. R. R. Co.*, 70 N. Y. 223, a service upon a director of a foreign corporation in the state of New York, while he was there temporarily on his own business, was a good service and a sufficient commencement of the action, although defendant had no property in that state, but in that case it was determined by the court that the contract was made in the state of New York. There the plaintiff had made a contract to enter defendant's service for a term of years, his business being to procure emigrants to purchase and settle on defendant's lands in Nebraska. Plaintiff was bound under the contract to maintain during the whole time an office in the city of New York, and was to go to Europe for two or three months to arrange for emigration, and, in accordance with said contract, opened and kept open in the city of New York the office until the contract was terminated by <sup>454</sup> the defendant. In that case, the court very properly held that in an action for services under the contract and for damages under the breach it was to be assumed that the parties understood that plaintiff's principal duties under the contract would be discharged in New York City, and that therefore the cause of action arose within that state. Substantially the same doctrine was announced in *Pope v. Terre Haute Car Mfg. Co.*, 87 N. Y. 137.

But the court in those cases was construing a statute vastly different from our statute, and maintained the doctrine that the manner of service depended entirely upon the legislature. These cases, however, stand alone so far as the announcement of the doctrine is concerned that the service on the officer of a foreign corporation who is temporarily in the state is a good service, with the possible exception of *Klopp v. Creston City Water Works Co.*, 34 Neb. 808, 33 Am. St. Rep. 666, a Nebraska case; though this case is not in point here for the reason that the statute of Nebraska was entirely different from our statute, and for the further reason that it was conceded in that case that the debt was contracted in Nebraska, while the finding of the court in this case is to the contrary, and, even if we should consider the complaint, there is nothing there that would indicate that the debt

had been contracted in this state. The doctrine announced by the New York cases has not been followed by the federal courts: See *Bentlif v. London etc. Corp.*, 44 Fed. Rep. 667.

The contention of the appellant that section 7 of article 12 of the constitution, which provides that "no corporation organized outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state," will be invaded if this judgment is maintained, has no force <sup>455</sup> from the fact that it appears from the findings of the court that the defendant corporation here is not transacting business within the state under any condition whatever.

Mr. Thompson in his work on Corporations, volume 6, section 8030, lays down the rule governing this case as follows: "It is a principle of American law, firmly settled, and one which may be regarded as the law everywhere, except where changed by statute, that service of process upon an officer or agent of a foreign corporation, casually or temporarily found within the jurisdiction, whether upon his own business, or otherwise, will not give jurisdiction to render a judgment in personam against the corporation. It can make no difference, in respect of the operation of this principle, whether the officer is casually or temporarily within the jurisdiction for his own private purposes, or for the purposes of the corporation—always provided that the local statute law has not changed the practice." And the cases cited by the author overwhelmingly support the principle therein announced. In fact, not only the weight of authority, but all the authority that we have been able to find outside of the New York and Nebraska cases above mentioned sustains this text. The cases are reviewed in 8 American and English Encyclopedia of Law, first edition, page 384.

Under the circumstances of this case, then, as shown by the findings of fact, the judgment of the lower court must be sustained, and it is affirmed.

Scott, C. J., and Gordon and Reavis, JJ., concur.

Anders, J., concurs in the result.

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**APPEALABLE ORDERS, WHAT ARE.**—Whether an order is appealable or not depends more upon what it purports to determine than upon its actual effect. The general rule is, that an appeal lies from an order only when it determines the action or affects some substantial right of the appellant: Extended note to *Davie v. Davie*, 20 Am. St. Rep. 173; *Harrison v. Lebanon Water-works*, 91 Ky. 255; 34 Am. St. Rep. 180, and note.



**APPEAL—WHAT WILL BE CONSIDERED ON.**—There can be no review on appeal of questions not raised at the trial: *Greene v. Greene*, 49 Neb. 546; 59 Am. St. Rep. 560, and note; *Reich v. Cochran*, 151 N. Y. 122; 56 Am. St. Rep. 607, and note.

**CORPORATIONS, FOREIGN—SERVICE OF PROCESS UPON.** Service of process on an officer of a foreign corporation who is casually in this state does not, in the absence of a statute conferring authority to make such service, give the courts of this state jurisdiction over such corporation, when it has neither an agency nor property in this state, and has not done business therein other than entering into a contract to be performed in another state: *Aldrich v. Anchor Coal etc. Co.*, 24 Or. 32; 41 Am. St. Rep. 831, and note.

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### SMITH v. SEATTLE.

[18 WASHINGTON, 484.]

**LIMITATIONS OF ACTIONS—REMOVAL OF LATERAL SUPPORT.**—The statute of limitations begins to run against a right of action for damages for the removal of lateral support only from the time that injury actually results therefrom, and not from the time of the act of removal.

Smith & Cole, for the appellant.

J. K. Brown and F. B. Tipton, for the respondent.

**485 GORDON, J.** The complaint in this action alleges that the appellant is the owner in fee of lot 2, block 42, of Terry's Second Addition to the city of Seattle, situated at the southwest corner of Seventh avenue and Alder street, said lot being sixty feet wide and one hundred and twenty feet long, and distant easterly from Yesler Way (a public street) about one hundred and thirty feet at its southwest corner, and about one hundred and seventy-five feet at its northwest corner, said block 42 being fractional, and bounded southwesterly by Yesler Way, which runs diagonally through it. That in the summer of 1888 plaintiff erected a dwelling-house on said lot; that in its natural state the lot was substantially level and the soil and earth of the lot so related to the soil and earth immediately to the southwestward, and to the soil and earth of Yesler Way that the latter formed the natural and actual support of the soil and earth of plaintiff's lot. That in the summer and fall of 1888 the city graded Yesler Way between Sixth and Seventh avenues, excavated to the depth of from fifteen to twenty-five feet below the natural surface of the land to the southwestward of plaintiff's property, and carelessly and negligently made such excavation without leaving or providing any means for lateral support for the soil and earth adjoining Yesler Way to the northeastward

thereof, in consequence of which the soil and earth immediately to the northeasterly of said Yesler Way "began forthwith to crack, subside, and slide away, which said cracking, subsidence, and sliding away has continued intermittently, but surely and without restraint northeasterly from Yesler Way ever since.

"That by reason of the careless, negligent, and unskillful grading of said Yesler Way as aforesaid by defendant, <sup>486</sup> and the failure of defendant to furnish any lateral support, or any support, in place of that removed by said grading to the land to the northeasterly of said Yesler Way, between Sixth and Seventh avenues, and to the said lot of plaintiff, the soil and earth immediately northeast of said Yesler Way during the period from the grading of said Yesler Way to the fall of the year 1896 kept gradually sliding or falling into said Yesler Way, and said defendant thereupon . . . so carelessly and negligently excavated and removed said sliding and falling soil and earth and provided no lateral or subjacent support in place thereof, that the soil and earth next further northeast thereto slid and fell into said excavation in and adjoining said Yesler Way; that in the months of October, November, December of 1896, and January, 1897, said defendant oftentimes actively and with great force excavated and removed from said Yesler Way the earth and soil sliding and falling thereon as aforesaid, carelessly and negligently, carrying away said soil and earth by sluicing and hydraulicking the same recklessly and carelessly, also going off from said Yesler Way to the northeast thereof upon private property between Sixth and Seventh avenues, and removing therefrom large masses of soil and earth for the purpose of the sooner tearing down said hillside and removing the lateral support of land to the northeasterly thereof and to plaintiff's lot, and providing no lateral support in place thereof for land adjacent thereto or to the lot of plaintiff; and also during said months . . . excavating and removing earth and soil from below the established grade of said Yesler Way, between Sixth and Seventh avenues, on account of which acts of defendant, carelessly, negligently, and wrongfully done, and on account of its failure to provide to plaintiff's lot lateral or subjacent support, the lot of plaintiff, in the month of October, 1896, began to crack, subside, and fall away onto adjoining land to the southwesterly thereof and into said Yesler Way, which said cracking, subsidence, and sliding away of the soil and earth of plaintiff's lot continued during the months of October, November, December of 1896, and January, 1897, nor was the same caused by or attributable <sup>487</sup> to the weight or otherwise of

plaintiff's said house, or any part thereof, or to any improvements on said lot made by plaintiff; . . . .

"That solely by reason of said grading, excavation, and removing of soil and earth . . . . and failure to provide lateral support in place of that removed . . . . the soil and earth of the west (40) forty feet of plaintiff's lot during the months of October, November, December, 1896, and January, 1897, cracked, broke away, and subsided to a depth of more than twenty (20) feet from its former and natural level and slid and moved westerly onto adjoining land and into Yesler Way; that by reason thereof plaintiff has suffered and sustained damages to the amount of three thousand (\$3,000) dollars."

The complaint further shows that before commencing the action plaintiff presented a claim in writing to the city council, and that such claim was rejected. To this complaint the city demurred upon two grounds, viz: 1. That the complaint does not state facts sufficient to constitute a cause of action; 2. That the action was not commenced within the time limited by law. The superior court sustained the demurrer, and this appeal is from that order and the judgment of dismissal which followed it.

In *Parke v. Seattle*, 5 Wash. 1, 34 Am. St. Rep. 839, we held that where a municipal corporation in grading a street so negligently excavates the earth that the abutting land is deprived of lateral support to such a degree as to cause damage, the city is liable for the damages thereby occasioned. The plaintiff in that action, *Parke*, was the owner of the lot situated between the lot of the appellant in the present action and Yesler Way.

As to the first ground of demurrer it seems to be conceded by respondent that the complaint states a cause of action unless the bar of the statute has run. Therefore, the real question for determination is, Was the action seasonably commenced? It is the contention of the respondent <sup>488</sup> "that any cause of action which plaintiff might have had which is based upon the negligence of defendant in grading Yesler Way in 1888 is barred by the statute of limitations."

We cannot agree with this contention. It appears from the complaint that the injury to plaintiff's property did not occur until October, 1896. The statute of limitations does not begin to run until a right of action exists, and the right of action did not exist until the injury occurred. The language of the statute is: "An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued": 2 Hill's Code, sec. 120; Ballinger's Code, sec. 4805.



Wilcox v. Plummer, 4 Pet. 172, has no application to the present case, and the other authority cited by respondent, viz., Wood on Limitations of Actions, section 179, does not sustain respondent's position. It is there said that: "In actions for injuries resulting from the negligence or unskillfulness of another, the statute attaches and begins to run from the time when the injury was first inflicted, and not from the time when the full extent of the damages sustained has been ascertained." As already observed, no injury to plaintiff's property was sustained until October, 1896.

The case of Backhouse v. Bonomi, 1 Best & S. 970, is squarely in point. In that case A was the owner of a house. B, the owner of a mine under it, in working the mine left insufficient support to the house. The house was not damaged until some time after the working had ceased. It was held that A could bring an action at any time within six years after the mischief happened, and was not bound to bring it within six years after the work was done which originally led to the mischief. To <sup>489</sup> the same effect are Mitchell v. Darley Main Colliery Co., L. R. 14 Q. B. Div. 125; affirmed, L. R. 11 App. Cas. 127; Stroyan v. Knowles, 6 Hurl. & N. 454; Bank of Hartford County v. Waterman, 26 Conn. 324.

It follows that the demurrer should have been overruled, and the order and judgment of the superior court must be reversed.

Dunbar, Anders, and Reavis, JJ., concur.

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**LIMITATIONS OF ACTIONS—REAL PROPERTY—REMOVAL OF LATERAL SUPPORT.**—Since the right of a party whose land is interfered with by the subsidence which follows an excavation upon adjoining property is merely a right to the ordinary enjoyment of land, no cause of action will accrue until the damage actually occurs: Monographic note to *Larson v. Metropolitan Street Ry. Co.*, 33 Am. St. Rep. 472, 473.

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2. STATUTE OF LIMITATIONS—UNITING ADVERSE POSSESSIONS BY ORAL CONTRACT.—If one in possession of real property without title sells his interest and delivers possession to another, though without any written contract, the purchaser may rely upon the prior adverse possession of his vendor to make out the time necessary to perfect his prescriptive title. (*Rembert v. Edmondson*, 819.)

3. MINES AND MINING—ADVERSE POSSESSION—STATUTE OF LIMITATIONS.—If there is no severance of coal from the surface an adverse entry upon the surface extends downward and draws to it a title to the underlying minerals. Hence, in such case, he who disseises another and acquires title by the statute of limitations, succeeds to the estate of him upon whose possession he has entered. But if such severance has been made before his entry, and he has notice of that severance, either by the record, or by the state of the possession acquired both by observation and by years of service in the employment of the owner, his entry upon either of the estates does not affect the other. (*Delaware etc. Canal Co. v. Hughes*, 743.)

4. MORTGAGE, PRESCRIPTIVE TITLE IN FAVOR OF MORTGAGEE AND AGAINST A MORTGAGOR.—If the mortgagee, to the knowledge of the mortgagor, denies that there is any mortgage, and asserts title in himself and otherwise manifests an adverse holding, the mortgagor and those claiming under him must proceed within five years or lose all remedy, whether the debt or obligation secured by the mortgage has been paid or not. (*Peshine v. Ord*, 131.)

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2. AGENCY — UNDISCLOSED PRINCIPAL — PARTIES.—The sole maker of a note, with nothing on its face disclosing his agency.



is not entitled, when sued thereon, to have his alleged principal made a party defendant on the ground that he signed the note as an agent only. (*Shuey v. Adair*, 879.)

3. AGENCY—POWER OF AGENT TO EXECUTE NEGOTIABLE PAPER.—The fact that an agent has on different occasions executed notes in the name of his principal, does not show authority so to do, especially when it appears that the principal had no knowledge of such transactions until after the agency had ceased. (*Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 628.)

4. AGENCY—POWER OF AGENT TO EXECUTE NEGOTIABLE PAPER.—An agent with general authority to manage his principal's business, has, by virtue of his employment, no implied authority to bind his principal by making a negotiable instrument. Such authority must be expressly conferred, or be necessarily implied from the exigencies and the general course of the particular employment, or the act must be ratified by the principal. This rule is applicable to the managing agent or general manager of a nontrading corporation, as well as to the agent of a natural person. (*Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 628.)

5. AGENCY—POWER OF AGENT TO EXECUTE NEGOTIABLE INSTRUMENTS.—The fact that an agent is general business manager for his principal, and that he drew checks against the funds of the latter, does not tend to establish his authority to execute negotiable instruments in the name of his principal. (*Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 628.)

6. AGENCY—POWER TO PLEDGE CREDIT.—An agent who is the general business manager of a nontrading corporation has implied power to borrow money therefor in an amount not disproportionate to the volume of business transacted, when it appears that the principal had knowledge that the monthly receipts of the business were less than the expenses, and that it was necessary for the agent to maintain a bank account in the name of the corporation. (*Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 628.)

7. AGENCY—NOTICE OF POWER OF AGENT.—The payee of a note is bound to know that the principal is not liable upon a note executed by an agent not clothed with power to act in that behalf. (*Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 628.)

8. PRINCIPAL AND AGENT—FORGERY BY AGENT.—If an agent intrusted with a check drawn by his principal, to be delivered to the payee named therein, forges his indorsement and succeeds in cashing the check, his act cannot bind his principal, nor estop the latter from recovering from the bank which had cashed such check and charged it to the drawer's account. (*German Sav. Bank v. Citizens' Nat. Bank*, 399.)

See Banks and Banking, 11, 12; Sales, 3.

#### APPEAL.

1. APPELLATE PRACTICE—APPEALABLE ORDER.—An order quashing a summons in effect determines the action or proceeding, and is therefore appealable. (*Carstens v. Leidigh etc. Lumber Co.*, 906.)

2. APPELLATE PRACTICE—APPEAL FROM ORDER.—An order amending a summons is no part of the record on an appeal from a prior order discharging an attachment, and cannot be reviewed by the appellate court. (*Sharman v. Huot*, 645.)

3. APPELLATE PROCEDURE—APPEAL, SERVICE OF NOTICE UPON AN ADMINISTRATOR, WHEN NOT NECESSARY. It is not necessary to serve a notice of appeal upon the adminis-

trator of a deceased defendant, if the rights of the parties may be determined without affecting his interests as administrator. Hence, if a judgment appealed from affects real property, and a notice of appeal is served upon all the heirs at law of the deceased defendant, the court may proceed with the appeal, though his administrator was not served. (*Brundage v. Cheneworth*, 382.)

4. ERROR—EVIDENCE NOT OF RECORD.—Evidence is not of record unless it is filed before being incorporated in the bill of exceptions. (*Taylor v. Reger*, 352.)

5. APPELLATE PROCEEDINGS—EVIDENCE NOT OF RECORD.—The evidence is not of record unless it is filed before being incorporated in the bill of exceptions. The record must show this affirmatively. (*Hinesley v. Sheets*, 356.)

6. APPEAL—SHORTHAND NOTES—DEPOSITION AS PART OF RECORD.—If the evidence, at the hearing of a deposition, is taken in shorthand, by the official stenographer, and, after its introduction, is immediately certified as required by law, and filed, it thereby becomes a part of the record without any order to that effect. (*Winters v. Winters*, 428.)

7. APPEAL—SHORTHAND NOTES—SKELETON BILL OF EXCEPTIONS—SUFFICIENT REFERENCE TO EVIDENCE.—If a skeleton bill of exceptions directs the clerk to insert a deposition or oral testimony, "as shown by the minutes of the shorthand reporter," taken upon the hearing of the deposition, the evidence is referred to with sufficient certainty, and the notes of the reporter, certified as required by law and filed, sufficiently identify the deposition. (*Winters v. Winters*, 428.)

8. APPELLATE PROCEDURE—QUESTIONS NOT PRESENTED TO THE TRIAL COURT.—Cases will be reviewed by the appellate court only upon points and theories presented to the trial courts. (*Rivard v. Rivard*, 566.)

9. APPELLATE PROCEDURE—POINTS NOT RAISED IN THE TRIAL COURT.—Where an objection of a technical nature is not raised in the trial court, and is not jurisdictional, no attention will be paid to it if made in the appellate court. (*O'Brien v. Stambach*, 368.)

10. APPELLATE PROCEDURE, OBJECTIONS NOT POINTED OUT IN THE TRIAL COURT.—If counsel deem a hypothetical question asked of a medical witness to be objectionable in any respect, they should call the attention of the trial court thereto. If, after the close of the testimony, they think the question assumed facts of which there was no evidence, they should move to have the answer stricken out. Failing to take any action in the trial court, they cannot urge their objections on appeal. (*Rivard v. Rivard*, 566.)

11. APPELLATE PROCEDURE, IMMATERIAL ERROR.—A verdict will not be set aside for an error of the trial court in permitting a question to be answered on cross-examination having no relevancy to the examination in chief, and therefore not a proper subject for cross-examination, if it would be a reflection on the intelligence of the jury to hold that the answer could have misled or prejudiced them. (*Rivard v. Rivard*, 566.)

12. APPEAL—PLEADING—MAKING A WILL PART OF AN ANSWER—REFERENCE WITHOUT EXHIBIT.—If the defendants in an action rely upon a probated will and, in express terms, make it a part of their answer, and refer to it as a part thereof, they will not be heard, on appeal, to say that the will is not a part of the answer, even if the will is not set out in the answer or as an exhibit thereto. (*Sutherland v. Sutherland*, 477.)



**13. PRACTICE—FAILURE OF INTERESTED PARTIES TO APPEAL.**—Though in a foreclosure suit a party interested in the mode of sale and apparently prejudiced by the decree does not appeal, yet, if other parties appeal, the decree must be modified as to the nonappealing party in so far as may be necessary to protect the equity of the appellants. (*Woodward v. Brown*, 108.)

**14. APPELLATE PRACTICE—EXCEPTIONS TO FINDINGS.** If no exceptions are taken to findings of fact and conclusions of law made by the trial court in a case tried exclusively upon affidavits, such affidavits cannot be considered upon appeal, the only question to be determined being whether the findings of fact warrant the conclusions of law. (*Carstens v. Leidigh etc. Lumber Co.*, 906.)

**15. APPEAL FROM ORDER CONFIRMING JUDICIAL SALE, EFFECT OF.**—If, after the confirmation of a judicial sale, an appeal is taken from the order of confirmation, its effect is thereby suspended, and the purchaser has no right to take possession, nor to collect the rents and profits. (*Pearson v. Gillenwaters*, 844.)

**16. JUDICIAL SALES—SHERIFF'S SALES—ABUSE OF DISCRETION—INADEQUACY OF PRICE.**—A decree of the lower court setting aside a sheriff's sale for mere inadequacy of price, is an abuse of discretion, and may be reversed on appeal. (*Stroup v. Raymond*, 758.)

**17. APPEAL—FREEHOLD IS INVOLVED, WHEN.**—In a suit brought to construe a will and to determine the validity of a devise of real estate therein contained, a freehold is involved upon an appeal from a decree holding that a specific devise of the fee simple title is void, and that such title passes under the residuary clause of the will. (*Hoeffler v. Clogan*, 241.)

**18. DAMAGES, NOMINAL—REVERSAL OF JUDGMENT TO SECURE.**—Judgment will not be reversed to enable a party to recover nominal damages. (*Kalen v. Terre Haute etc. R. R. Co.*, 343.)

See Trial, 6.

## ASSESSMENTS.

See Taxes, 1-3.

## ASSIGNMENT.

See Bills of Lading, 1; Mortgage, 3, 4, 18; Negotiable Instruments.

### ASSIGNMENT FOR BENEFIT OF CREDITORS.

**1. AN ASSIGNEE FOR THE BENEFIT OF CREDITORS REPRESENTS,** and stands in the place of, creditors of the assignor, and has the right to contest claims and assert rights which, at the assignment, they had a right to contest or assert. (*Franklin Nat. Bank v. Whitehead*, 302.)

**2. ASSIGNMENT FOR THE BENEFIT OF CREDITORS.**—The title of an assignee for the benefit of creditors prevails over that of a prior assignee or mortgagee whose assignment or mortgage is void against creditors, because neither acknowledged, recorded, nor followed by a delivery of the possession of the property subject thereto. (*Franklin Nat. Bank v. Whitehead*, 302.)

**3. ASSIGNMENT FOR BENEFIT OF CREDITORS—DEBT DUE STATE OR COUNTY—RELEASE OF, BY PARTIAL PAYMENT.**—A partial payment, out of an insolvent estate, of a debt due to a state or county, cannot operate as a release of the unpaid portion of the debt, as provided by the assignment law, where the constitution expressly forbids the extinction of such a debt, except by payment into the proper treasury. (*State v. Foster*, 47.)



**4. ASSIGNMENT FOR BENEFIT OF CREDITORS—TITLE—PRIORITY—CLAIM OF STATE OR COUNTY.**—A general assignment for the benefit of creditors passes the title of the property assigned to the assignee, free of any preference or priority of claim on the part of the state, or a county thereof. If the state or county had any preference, the assignment defeats it. (*State v. Foster*, 47.)

**5. PARTNERSHIP — ASSIGNMENT OR TRUST DEED — WHEN VOID AS AGAINST FIRM CREDITORS.**—If one of three members of an insolvent corporation withdraws therefrom, transferring all his interest to the others, who form a new partnership, and, after doing business a few days, the members of the new firm execute an assignment or trust deed for the benefit of its and their creditors, including therein all the assets received from the old firm, such deed or assignment is fraudulent as against creditors of the old firm, and hence both it and the transfer made by the retiring member will be disregarded, and the assets of the old firm held to be subject to the satisfaction of its liabilities. (*Franklin Sugar Ref. Co. v. Henderson*, 524.)

See Trusts, 11.

### ATTACHMENT.

**1. ATTACHMENT—TIME OF ISSUANCE OF WRIT.**—A writ of attachment issued before the summons is not merely voidable, but void, under a statute providing that "the plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached." (*Sharman v. Huot*, 645.)

**2. ATTACHMENTS. INSUFFICIENCY OF SHERIFF'S RETURN.**—It is not sufficient for a sheriff to state in his return that he has attached certain property, describing it. He must show the doing of the acts necessary to be done by him in making a complete and valid levy of the writ. (*Anderson v. Moline Plow Co.*, 424.)

**3. ATTACHMENTS—DELIVERY BONDS.**—In an action upon a delivery bond, it is a sufficient defense that at the time of the levy of the attachment the property belonged to a person other than the defendant in the writ. (*Ayres etc. Co. v. Dorsey Produce Co.*, 376.)

**4. SHERIFFS, ATTACHED PROPERTY, NOTICE TO OF CLAIM OF OWNERSHIP OF.**—Under the statutes of Iowa it is not necessary for one who claims to be the owner of attached property to serve a notice of such claim before commencing an action to recover such property, if a delivery bond has already been executed by which the officer levying the writ is amply protected. (*Ayres etc. Co. v. Dorsey Produce Co.*, 376.)

See Banks and Banking, 25; Mortgage, 13.

### ATTORNEY AND CLIENT.

**ATTORNEYS' FEE, COURTS MAY FIX WITHOUT EVIDENCE.**—Where a mortgage provides that in case of default, the mortgagee may foreclose, and shall be entitled to a reasonable counsel fee, to be fixed by the court, the court may fix the amount of such fee in the absence of any testimony upon the subject. (*Woodward v. Brown*, 108.)

See Executors and Administrators, 1, 2

### BAGGAGE.

See Carriers, 2, 3.

## BAILMENT.

**BAILEE'S LIABILITY—DESTRUCTION OF PROPERTY.—**

When property in the custody of the bailee is destroyed accidentally, without any fault on his part, he is not liable. (*Drudge v. Leiter*, 359.)

See Warehousemen, 7.

## BANKS AND BANKING.

1. **BANKS—CHECKS—DISHONOR OF, IS UNAUTHORIZED WHEN.**—A bank is not authorized to refuse payment of a check to a bona fide holder, if the drawer's deposit is sufficient, although the drawer has ordered the bank not to pay the check. (*Gage Hotel Co. v. Union Nat. Bank*, 270.)

2. **BANKS—CHECKS—DISHONOR OF—LIABILITY OF BANK.**—If a bank has sufficient funds of the drawer on deposit, with which to pay a check duly presented, it is liable to a bona fide holder for value, although payment is refused by direction of the drawer. (*Gage Hotel Co. v. Union Nat. Bank*, 270.)

3. **A BANK PAYING A CHECK UPON A FORGED INDORSEMENT** and charging the amount thereof to the account of the drawer is liable to him, if the amount was wrongfully charged to his account, where the check has never been delivered to the payee. (*German Sav. Bank v. Citizens' Nat. Bank*, 399.)

4. **BANKS—CHECKS—PRIVATE ARRANGEMENT AS TO PAYMENT—EFFECT OF.**—A private arrangement between a bank and one of its depositors not to apply a new deposit to the payment of a check previously drawn, does not exonerate the bank from its liability to pay such a check, if the amount of the drawer's old and new deposits are together sufficient to pay it. (*Gage Hotel Co. v. Union Nat. Bank*, 270.)

5. **BANKING—RIGHT TO RECOVER FOR PAYMENT OF FORGED CHECK.**—If a bank draws a check in favor of a third person, who has no knowledge thereof, and whose name is thereafter forged thereon, and the check cashed by another bank, which, in turn, sends it to a third for collection, and the latter charges the amount thereof against the drawer's deposit account with it, the drawer may recover the sum so wrongfully charged against its account. (*German Sav. Bank v. Citizens' Nat. Bank*, 399.)

6. **A BANK IS NOT GUILTY OF NEGLIGENCE** in not discovering, for nearly a year, that a check drawn by it and paid by another bank and charged to the drawer's account had been paid upon a forged indorsement. It had a right to assume that the bank thus making payment had satisfied itself of the genuineness of the indorsement. (*German Sav. Bank v. Citizens' Nat. Bank*, 399.)

7. **BANKING—FORGED CHECKS.—A DEPOSITOR DOES NOT OWE** any duty to a bank to examine his pass-book and checks for the purpose of detecting forgeries of the payee's name on checks drawn by such depositor. (*German Sav. Bank v. Citizens' Nat. Bank*, 399.)

8. **A BANK IS NOT BOUND TO TAKE NOTICE** of memoranda or figures on the margin of a check which the depositor placed there for his own convenience to preserve information for his own benefit. (*Duckett v. Mechanics' Nat. Bank*, 513.)

9. **BANKING—CHECKS, INQUIRIES RESPECTING, CONSTRUCTION OF.**—If a bank which has drawn a check is asked over the telephone whether it has issued a check in favor of a designated person, and whether it is all right, and answers in the affirmative, it does not thereby affirm that the indorsement of the

payee's name on the check, which indorsement it has never seen, is genuine, nor that the person presenting the check is entitled to receive payment. Such an inquiry would ordinarily be understood as applying only to the validity of the drawer's signature, and to the question whether there were moneys with which to meet the check. (*German Sav. Bank v. Citizens' Nat. Bank*, 399.)

10. **INTEREST, WHEN RECOVERABLE.**—If a check is paid upon a forged indorsement and the amount thereof wrongfully charged to a depositor, who thereafter sues to recover the amount thus wrongfully deducted from his deposit account, he is entitled to recover interest from the date of such charge, though his deposit could not draw interest. (*German Sav. Bank v. Citizens' Nat. Bank*, 399.)

11. **BANKS AND BANKING—PRINCIPAL AND AGENT.**—If a national bank voluntarily acts as agent for its depositor in the sale of his stock or securities, and accepts a check in payment instead of cash, without authority from him, and credits his account with the amount of the check, it is liable to him therefor, although such check afterward proves worthless, and the bank exercises due diligence in attempting to collect it. (*Pepperday v. Citizens' Nat. Bank*, 769.)

12. **BANKS AND BANKING—PRINCIPAL AND AGENT—VOLUNTARY PAYMENT.**—If a bank acts as agent for its depositor in a sale of his securities and accepts a check instead of cash in payment, without authority from him, notifying him of the deposit of such check to his credit, and afterward paying his check for the amount so received, such payment is voluntary and cannot be recalled by the bank, although the check received by it subsequently proves to be worthless, and it uses due diligence in attempting to collect it. (*Pepperday v. Citizens' Nat. Bank*, 769.)

13. **BANKS—WHEN NOT ANSWERABLE FOR PAYING OUT MONEYS.**—Whenever moneys are placed on deposit, and neither the bank nor any of its officers are aware that such moneys do not belong to the person depositing them, it, by paying out the moneys on the depositor's check, frees itself from all liability therefor, though it turns out that they belong to another. (*Duckett v. Mechanics' Nat. Bank*, 513.)

14. **BANKS—LIABILITY FOR MONEYS DEPOSITED BY ONE AS TRUSTEE.**—If moneys are deposited by one as trustee, he, as such trustee, has a right to withdraw them, and the bank, in the absence of notice to the contrary, is bound to assume, and is protected in assuming, that the trustee will appropriate the moneys, when drawn, to the proper use. (*Duckett v. Mechanics' Nat. Bank*, 513.)

15. **A BANK IN WHICH MONEYS ARE DEPOSITED IN THE NAME OF A TRUSTEE** as such is under no obligation to look to the appropriation of moneys withdrawn by him, or to protect the trust by setting up the *jus tertii* against the demand. (*Duckett v. Mechanics' Nat. Bank*, 513.)

16. **IF A BANK IN WHICH MONEYS ARE DEPOSITED IN THE NAME OF A TRUSTEE** as such, has knowledge that a breach of his trust is being committed by the improper withdrawal of such funds, or if it participates in the profits or fruits of any fraud upon the trust, it is answerable. (*Duckett v. Mechanics' Nat. Bank*, 513.)

17. **BANKING—TRUST FUNDS—NOTICE THAT DEPOSIT CONSISTS OF—WHAT IS NOT.**—A check directing moneys to be paid to the credit of H. C., adding "being a balance of the purchase money due him as trustee for I. R. C." is payable to him personally, and hence does not charge the bank in which it is deposited with notice that it represents trust funds, and that it is a breach of the



trust to deposit it to the individual account of the trustee and to draw it out on his personal checks. (*Duckett v. Mechanics' Nat. Bank*, 513.)

18. **BANKS—TRUST FUNDS, NOTICE OF—WHEN IMPARTED BY A CHECK.**—A check for a sum of money "to deposit to the credit of H. C., Trustee," notifies the bank that he is not the owner of the money, and instructs it not to place that money to his personal account, and if it does place the money to his personal credit and loss ensues, it is answerable. In the eye of the law it participates in the breach of the trust. (*Duckett v. Mechanics' Nat. Bank*, 513.)

19. **BANKS—WHEN LIABLE FOR TRUST FUNDS IMPROPERLY WITHDRAWN.**—If a bank receives a check payable to a depositor as trustee, and credits it to his personal account and permits him to draw it out on his personal check, it is liable with him for a breach of the trust. (*Duckett v. Mechanics' Nat. Bank*, 513.)

20. **FRAUDULENT BANKING.—AN INDICTMENT** for fraudulent banking sufficiently states who was injured or defrauded, and who was the owner of the deposit, where it charges that the banker, knowing himself to be insolvent, accepted a deposit from a person named. (*State v. Eifert*, 433.)

21. **FRAUDULENT BANKING—DEFENSE.**—It is no defense to an indictment for fraudulent banking, in receiving a deposit knowing the bank to be insolvent, that the depositor might pursue the deposit as a trust fund. (*State v. Eifert*, 433.)

22. **FRAUDULENT BANKING—EVIDENCE OF RECEIVING DEPOSIT—UNAUTHORIZED ACT—INSTRUCTION.**—Upon the trial of a banker for fraudulent banking, in receiving a deposit knowing the bank to be insolvent, it is proper to instruct the jury that the defendant "knowingly accepted and received" the deposit, though it was received against his express orders, when he, after knowledge of its being made, accepted it as a deposit, and treated it as a part of the assets of the bank; as such instruction places the acceptance of the deposit on the defendant's own act, and not on the ratification of the act of his cashier, who disregarded his orders. (*State v. Eifert*, 433.)

23. **FRAUDULENT BANKING—EVIDENCE OF RECEIVING DEPOSIT.**—Upon the trial of a banker for fraudulent banking, in receiving a deposit knowing himself to be insolvent, the fact that the defendant received and accepted the deposit is proved by showing that it was received by the cashier or agent of the defendant, under his authority, without showing that it was received by him personally, or that he was present when it was received. (*State v. Eifert*, 433.)

24. **FRAUDULENT BANKING—BANKER IS GUILTY OF, WHEN.**—If a banker, knowing his bank to be insolvent, leaves it for a distant city and telephones his son, left in charge of the bank, not to receive any more deposits, but to close the bank, and the son, after receiving such message, ignores it, and accepts a deposit before closing, and the father, upon his return, is made acquainted with what has been done, and fails to repudiate the transaction, but, on the contrary, retains the money and includes it, some days later, in a general assignment for the benefit of his creditors, the banker is guilty of the offense of receiving and accepting a deposit knowing himself to be insolvent. (*State v. Eifert*, 433.)

25. **CORPORATIONS—ULTRA VIRES—NATIONAL BANKS.**—If a national bank advances money on goods about to be shipped and receives a bill of lading as collateral security, one who subsequently attaches such goods under a writ against the shipper is not in a posi-

tion to insist that the act of the bank was ultra vires. (Ayes etc. Co. v. Dorsey Produce Co., 376.)

26. NATIONAL BANKS — STOCKHOLDER'S LIABILITY, WHO HOLDS STOCK IN TRUST.—One to whom stock in a national bank has been issued as self-appointed attorney of an infant of tender years, or for an undisclosed principal, is subject to the liabilities imposed by the acts of Congress upon stockholders in such banks. (Kerr v. Urie, 493.)

27. HUSBAND AND WIFE.—A TRANSFER BY A HUSBAND TO HIS WIFE OF STOCK IN A NATIONAL BANKING CORPORATION, made in good faith, vests her with the ownership thereof, and her equitable title is complete before a certificate is issued to her and before any entry of the transfer is made on the books of the corporation. After such transfer the husband is not subject to any liabilities which attach, under the laws of Congress, to the holders of stock in such corporations. (Kerr v. Urie, 493.)

See Bills of Lading, 2; Checks; Corporations, 4; Trusts, 8-10; Witnesses, 2.

### BILL OF EXCEPTIONS.

See Appeal, 4, 5, 7.

### BILLS OF LADING.

1. BILLS OF LADING.—AN ASSIGNMENT OF a bill of lading, while goods are in the possession of the carrier, operates to transfer the title thereto. (Ayes etc. Co. v. Dorsey Produce Co., 376.)

2. BILL OF LADING AS COLLATERAL SECURITY.—A bank advancing moneys on goods about to be shipped may receive and hold a bill of lading in its name as collateral security for such advances. (Ayes etc. Co. v. Dorsey Produce Co., 376.)

See Banking, 25; Carriers, 9.

### BONA FIDE PURCHASERS.

See Judgment, 13; Negotiable Instruments, 3.

### BURDEN OF PROOF.

See Conveyance, 4; Insurance, 11; Judgment, 6; Mortgage, 11; Negligence, 4; Partition, 3, 4.

### CARRIERS.

1. CARRIERS. NEGLIGENCE, STIPULATIONS SEEKING TO EXCLUDE FROM LIABILITY FOR.—A common carrier cannot stipulate for exemption from liability for his own negligence. (Bird v. Railroads, 856.)

2. CARRIERS—LIABILITY FOR GOODS AS BAGGAGE.—While a carrier of passengers is not obliged to accept anything but ordinary baggage as baggage, yet, if without extra compensation, and knowing that it is not personal baggage, he permits it to be treated, and carried as such, he is liable for its loss through negligence. (Toledo etc. Ry. Co. v. Bowler etc. Co., 702.)

3. CARRIERS—LIABILITY FOR MERCHANDISE CARRIED AS BAGGAGE.—If a carrier of passengers, for the purpose of obtaining patronage, and with actual knowledge of all the material facts, waives its right to refuse merchandise which it is requested to carry as baggage, or to make an additional charge commensurate with the increased risk, and carries it as baggage, it cannot, after a loss has occurred, assert an immunity from liability because of such right. (Toledo etc. Ry. Co. v. Bowler etc. Co., 702.)

4. A CARRIER OF LIVESTOCK is not liable as a common carrier. (*Heller v. Chicago etc. Ry. Co.*, 541.)

5. A CARRIER OF LIVESTOCK OWES TO THE SHIPPER the duty to transport the car and its contents with ordinary prudence, skill, and care, and with reasonable dispatch. (*Heller v. Chicago etc. Ry. Co.*, 541.)

6. CARRIERS.—A shipper of livestock assumes all the ordinary risks of transportation, including that resulting from its restlessness, viciousness, exhaustion, hunger, and thirst, and also from jars and concussions induced by the stopping and starting of the train, and where responsible for the number placed in a car, he also assumes all risks arising from its overcrowded condition. (*Heller v. Chicago etc. Ry. Co.*, 541.)

7. CARRIERS—LIVESTOCK.—A shipper of livestock, where it is the custom of shippers to send a caretaker, who fails to comply with this custom, assumes all the risk of injury resulting therefrom. He has no right to assume that the conductor or brakeman of the train will perform the duties of caretakers of his stock, and hence cannot recover for losses suffered through their failure to do so. (*Heller v. Chicago etc. Ry. Co.*, 541.)

8. CARRIERS.—THE FIRST OR INITIAL CARRIER may undertake the transportation of goods to the terminus of its line merely, and hence may, by stipulation or condition in its bill of lading, limit its liability to its own line. (*Bird v. Railroads*, 856.)

9. CARRIERS.—EACH OF SEVERAL CONNECTING CARRIERS over all their routes is entitled to the benefit of any lawful exemption or exception contained in the bill of lading issued by the initial carrier, though such carrier restricts its liability to its own lines. (*Bird v. Railroads*, 856.)

10. CARRIERS, INTERMEDIATE, DUTIES OF.—Where a second, or intermediate carrier, in delivering goods to a third carrier, is, by the latter, informed that they will not be forwarded until the freight charges are paid, it becomes the duty of the intermediate carrier to notify the shipper or the initial carrier, and such intermediate carrier is answerable for the loss of the goods through their being detained for the nonpayment of charges, because the shipper is ignorant of the demand for such payment by the third carrier. (*Bird v. Railroads*, 856.)

11. CARRIERS, CONNECTING.—THE INITIAL AND INTERMEDIATE CARRIERS, by accepting goods for transportation to a designated station beyond the line of their routes, thereby represent to the shipper that such station is not a prepay station, and obligate themselves to see that the shipper is not injured by a demand made by the final carrier for the payment of freight charges as a condition precedent for the transportation to such station. (*Bird v. Railroads*, 856.)

12. CARRIERS.—A PREPAY STATION IS ONE at which the carrier delivers freight to the consignee, directly and without the intervention of a local agent, and to which consignments are accepted only upon the condition of charges for transportation being prepaid by the shipper. (*Bird v. Railroads*, 856.)

## CHARITIES.

1. CHARITIES—CHARITABLE TRUST—DEFINITIONS.—A charity is a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting to establish themselves for life, or by erecting or maintaining pub-



lic buildings or works, or otherwise lessening the burdens of government. Any trust, coming within this definition, for the benefit of an indefinite class of persons, sufficiently designated to indicate the intention of the donor, and constituting some portion or class of the public, is a charitable trust. (Hoeffer v. Clogan, 241.)

2. CHARITIES—NAME IS NOT MATERIAL, BUT PURPOSE IS.—In determining what is to be regarded as a charitable gift, it is immaterial whether the purpose is called "charitable" in the gift itself, if it is so described as to show that it is charitable in its nature. (Hoeffer v. Clogan, 241.)

3. CHARITIES—SUPERSTITIOUS USES—MASSES FOR REPOSE OF SOULS.—The doctrine of superstitious uses arising from the statute, 1 Edward VI, chapter 14, under which devises for procuring masses were held to be void, is not in force in the state of Illinois, and has never obtained in the United States. (Hoeffer v. Clogan, 241.)

4. CHARITIES—MASSES FOR REPOSE OF SOULS—VALID BEQUEST.—A devise of real estate to an unincorporated religious society, in trust, the property to be sold, and the proceeds expended for saying masses for the repose of the testator's soul, and the souls of his relatives, is a valid charitable bequest. (Hoeffer v. Clogan, 241.)

5. CHARITABLE USE, BEQUEST FOR, WHEN NOT VOID FOR UNCERTAINTY.—A devise or bequest of the balance of the testator's estate to be divided among such benevolent, charitable, and religious institutions as his executors or their successors shall select, is not void for uncertainty. (Murphy's Estate, 802.)

6. CHARITABLE USE—WHAT MAY BE SUSTAINED AS.—A bequest for benevolent, charitable, and religious institutions or associations to be selected by the testator's executors is sustainable as a charitable bequest. (Murphy's Estate, 802.)

7. CHARITABLE USES.—A bequest of property to trustees to pay such worthy poor girls to aid in their education as the judgment of the trustees shall have dictated, they having full power as to the amounts to be paid and the times of payment, is ineffective and must fail. (Wheelock v. American Tract Soc., 578.)

8. CHARITABLE USES—DISCRETION OF THE TRUSTEES, WHEN AVOIDS.—A bequest to trustees to be applied to useful and charitable purposes, that is to say, they are to dispose of the property in such sums as in their discretion they shall think proper and right, that is, to pay to four associations, naming them, expressing also a desire to aid worthy poor girls in their education and giving the trustees authority to devote to that purpose sums not turned over to such associations, is void under the statutes of Michigan, because the trust is not fully and clearly expressed. (Wheelock v. American Tract Soc., 578.)

9. CHARITIES—JURISDICTION OF EQUITY—STATUTE OF CHARITABLE USES.—The jurisdiction of equity over charitable uses was not derived from the statute of charitable uses, 43 Elizabeth, chapter 4. Prior to, and independently of, that statute, charities were sustained, irrespective of indefiniteness of the beneficiaries, or the lack of trustees, or the fact that the trustees appointed were not competent to take. (Hoeffer v. Clogan, 241.)

10. CHARITIES—STATUTE OF CHARITABLE USES—LAW OF ILLINOIS.—The doctrine of charitable uses is a part of the law of the state of Illinois, and the statute of charitable uses, 43 Elizabeth, chapter 4, is a part of the common law of the state. (Hoeffer v. Clogan, 241.)

11. CHARITIES—"CHARITABLE" PURPOSE—HOW DETERMINED.—In the state of Illinois, the statute of charitable uses, 43

**Elizabeth**, chapter 4, is considered in determining the general spirit and intent of the term, "charitable," and the objects which are to be regarded as charitable. (*Hoeffer v. Clogan*, 241.)

**12. CHARITIES—SUITS—PROPER PARTIES DEFENDANT.** In a suit brought to construe a will and to determine the validity of a charitable bequest and devise therein contained, made to the officers and trustees of an unincorporated religious society, such officers and trustees are proper parties defendant, and may appeal from a decree holding the bequest and devise to be invalid. (*Hoeffer v. Clogan*, 241.)

**13. CHARITIES—TRUST WILL NOT FAIL FOR WANT OF TRUSTEE.**—A devise of real estate and bequest of money to an unincorporated religious society, in trust, for a charitable purpose, such as saying masses for the repose of souls, will not be allowed to fail for want of a competent trustee, for the court will appoint one to take the gifts and apply them to the purposes of the trust. (*Hoeffer v. Clogan*, 241.)

**14. CHARITABLE USES — DISCRETIONARY POWERS IN TRUSTEES.**—In the case of a will making a charitable bequest, it is immaterial how vague, indefinite, and uncertain the objects of the testator's bounty may be, provided there is a discretionary power vested in some one over its application to those objects. (*Murphy's Estate*, 802.)

#### CHATTEL MORTGAGE.

**A MORTGAGE OR ASSIGNMENT OF GOODS AS A SECURITY IS VOID** even as against creditors having notice thereof if it is neither acknowledged, recorded, nor accompanied by a delivery to the mortgagee or the pledgee of the property subject thereto. (*Franklin Nat. Bank v. Whitehead*, 302.)

#### CHECKS.

**1. BANKS—CHECKS—DISHONOR OF, BY DIRECTION OF DRAWER.**—The drawer of a check cannot stop payment of it after it has passed into the hands of a bona fide holder. (*Gage Hotel Co. v. Union Nat. Bank*, 270.)

**2. A DRAWER OF A CHECK IS NOT ESTOPPED** from recovering moneys paid on a forged indorsement thereof, and wrongfully charged to his account, by the fact that he had stated to the person thus paying the check that he had made a loan to the payee, if, at the time of making such statement, he believed it to be true. (*German Sav. Bank v. Citizens' Nat. Bank*, 399.)

**3. BANKS — CHECKS — DRAWING ON ANTICIPATED FUNDS—EFFECT OF.**—A depositor in a bank has a right to draw his check in the reasonable expectation that he will have sufficient funds, at the time of presentment, to meet it. Hence, inadequacy of funds, at the time the check is drawn, does not affect the holder's right to payment, if there are sufficient funds on hand when the check is presented. (*Gage Hotel Co. v. Union Nat. Bank*, 270.)

See Banks and Banking.

#### COLLATERAL SECURITY.

See Bills of Lading, 2.

#### COLLOQUIUM.

See Slander, 5.

#### COMMODITY.

See Definitions, 1; Insurance, 1.

## COMMON LAW.

1. **COMMON LAW, WHAT IS.**—As a rule, the term “common law” means both the common law of England, as opposed to statute or written law, and the statutes passed before the emigration of the first settlers of America. (*Cowhick v. Shingle*, 17.)

2. **COMMON LAW—EXISTENCE OF, IN WYOMING.**—The common law is in force in the state of Wyoming only to the extent that it has been adopted by statute. (*State v. Foster*, 47.)

See Charities, 10; Copyright, 1, 3; Limitations of Actions, 1; Party-Walls, 1.

## CONDITIONS.

See Contracts, 2; Conveyances, 2, 3.

## CONFLICT OF LAWS.

See Marriage and Divorce, 2-4, 9; Mechanic's Lien, 3; Mortgage, 1; Usury, 1.

## CONSPIRACY.

1. **CONSPIRACY AS A SUBJECT OF CIVIL ACTION.**—A conspiracy cannot be made the subject of a civil action, unless something is done which, without the conspiracy, would give the right of action. (*Beechley v. Mulville*, 479.)

2. **CONSPIRACY TO FIX RATES OF INSURANCE—FORBIDDEN COMBINATIONS.**—A compact between local insurance agents of different cities to fix the rates upon all risks therein, and which imposes certain penalties for the taking of risks at less rates than those fixed by the compact, comes within the prohibition of a statute which forbids the formation of combinations or confederations to regulate or fix the price of any commodity. (*Beechley v. Mulville*, 479.)

3. **CONSPIRACY—FIXING RATES OF INSURANCE—UNLAWFUL TRANSACTION.**—If local insurance agents form an unlawful combination or compact to regulate and fix rates of insurance, with certain rules, regulations, and penalties, an agent, who is a member of the compact, and who represents companies, not members of it, but which have a right to discharge him at pleasure, cannot, after his violation of the terms of the compact, and the revocation of his agencies, by the compact and companies represented by him, because of his refusal to observe the terms of the combination, recover damages, either from the members of the compact or from such insurance companies, for the loss occasioned to him by such revocation, especially where the agencies came to him as a member of the compact, upon an agreement to do business under its rules; and it makes no difference that the members of the compact and such insurance companies acted together to enforce the rules and regulations of the combination. The transaction, in its entirety, is unlawful. (*Beechley v. Mulville*, 479.)

## CONSTITUTIONS.

1. **CONSTITUTIONAL LAW, INTERPRETATION OF.**—Words or terms used in a constitution, which is dependent upon ratification by the people, must be understood in the sense most obvious to the common understanding at the time of its adoption. (*Bishop v. State*, 279.)

2. **STATES—DEBTS—PREFERENCE OR PRIORITY.**—A CONSTITUTIONAL PROVISION that no liability or obligation owned or held by the state, or any of its municipalities, shall be



extinguished, except by payment thereof into the proper treasury, gives no preference or priority to the state, or a municipality thereof, over a citizen, in the payment of debts, owed by a common debtor. It has no reference to the question of such preference or priority. (*State v. Foster*, 47.)

See *Municipal Corporations*, 3.

## CONTRACTS.

1. **CONTRACTS — CONSTRUCTION — MEANING AND INTENT.**—The rule of construction is the same for contracts as for statutes. The object to be attained in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used. (*McFarland v. Railway Officials' etc. Assn.*, 29.)

2. **CONDITIONS PRECEDENT — NONPERFORMANCE OF CONDITIONS PRECEDENT—EXCUSE.**—An allegation that the opposite party refuses to permit performance of conditions precedent is not equivalent to an allegation of performance, nor can the repudiation of a contract by one party be held equivalent to performance, or a legal excuse for nonperformance, by the other, of conditions precedent so as to authorize recovery as for performance of such conditions precedent. (*Thomson v. Kyle*, 193.)

3. **CONTRACTS CREATING A MONOPOLY, OR PREVENTING COMPETITION—INVALIDITY OF.**—All contracts in which the public are interested, and which tend to prevent competition required by statute, or some known rule of law, or which tend to create a monopoly, are void. (*Fishburn v. Chicago*, 236.)

4. **CONTRACTS—RESTRAINT OF TRADE.**—All agreements in general restraint of trade are against public policy and void, but agreements that only impose a partial restraint made in connection with the purchase of a business that are reasonably necessary to make available the goodwill purchased with the business, and are reasonable and not oppressive, may be enforced. (*Lufkin Rule Co. v. Fringelli*, 736.)

5. **CONTRACTS — RESTRAINT OF TRADE.**—An agreement entered into at the time that a business with the goodwill thereof is sold, not to engage directly or indirectly in the same business again in the same state for the period of twenty-five years, is in general restraint of trade, tends to create a monopoly, and is void. (*Lufkin Rule Co. v. Fringelli*, 736.)

6. **CONTRACTS — RESTRAINT OF TRADE.**—An agreement entered into at the time that a business with the goodwill thereof is sold, not to engage in the same business, directly or indirectly, in that state, or in the United States, for a period of twenty-five years, is in restraint of trade and void as tending to create a monopoly, whether or not such restraint is necessary to the reasonable enjoyment of the goodwill so purchased. (*Lufkin Rule Co. v. Fringelli*, 736.)

7. **CONTRACTS—RESTRAINT OF TRADE.**—Contracts whereby men are purchased out of business, and restrained from carrying it on anywhere else, tend to create a monopoly, and are void. (*Lufkin Rule Co. v. Fringelli*, 736.)

8. **ACTION ON IMPLIED CONTRACT—AMOUNT TO BE RECOVERED.**—In an action on an implied contract for wheat sold, plaintiff can recover not the value of the wheat, but the price received. (*Drudge v. Leiter*, 359.)

See *Municipal Corporations*, 1, 2.

CONVEYANCES.

1. A CONVEYANCE by the heirs of C made in his lifetime passes their title, if, as such heirs, they are remaindermen, he having merely a life estate in possession. (*Defreese v. Lake*, 584.)

2. CONDITION SUBSEQUENT, WHAT IS NOT.—A conveyance of real property made for a full and valuable consideration declaring that the property "is for a public schoolhouse, as the property of the schools of said city and for no other purpose, in fee"; does not create a condition subsequent, and hence the property does not, on the abandonment of its use for school purposes, revert in the grantor or his heirs. (*Faith v. Bowles*, 489.)

3. CONDITIONS SUBSEQUENT ARE NOT FAVORED in law, and hence are not raised by implication from the mere declaration in a conveyance of property that it is to be used for a special or particular purpose only. (*Faith v. Bowles*, 489.)

4. EVIDENCE—BURDEN OF PROOF RESPECTING TIME OF DELIVERY OF DEEDS.—If two conveyances are dated and acknowledged on the same day, but one is recorded three days before the other, one who claims that the latter conveyance was made before the other must assume the burden of proof. (*Woodward v. Brown*, 108.)

See Covenants; Notice.

COPYRIGHT.

1. A COPYRIGHT AND THE COMMON-LAW RIGHT of an author or publisher of a book cannot exist at the same time. The acquisition of the former terminates the latter. (*Jewelers' Mercantile Agency v. Jewelers' etc. Co.*, 666.)

2. COPYRIGHT, PUBLICATION SUFFICIENT TO SECURE. One who records the title of a book, and causes copyright notices to be printed on its title page, and delivers two printed copies to the librarian of Congress, thereby publishes the book so far as necessary to secure a copyright. (*Jewelers' Mercantile Agency v. Jewelers' etc. Co.*, 666.)

3. THE PUBLICATION OF A BOOK DEFEATS THE COMMON-LAW RIGHT of its author or publisher, whether a copyright is secured or not. After that, every one may make use of the book, if he sees fit. (*Jewelers' Mercantile Agency v. Jewelers' etc. Co.*, 666.)

4. BOOK, PUBLICATION OF, WHAT IS AND WHAT IS NOT.—One writing a book may keep the manuscript without printing it, or may print it and determine that the public may not see it, or may give it private circulation for a restricted purpose without losing his common-law rights therein, but if he deposits two copies of the book with the librarian of Congress, and delivers other copies to subscribers, though with an agreement that the book is loaned and not sold, and that it should not be given to, or seen by, others, it is published, and the author's common-law rights are at an end, and others may use the book and republish any information contained therein. (*Jewelers' Mercantile Agency v. Jewelers' etc. Co.*, 666.)

CORPORATIONS.

1. A CORPORATION POSSESSES ONLY SUCH POWERS as are expressly given it by law, and such implied powers as are necessary to enable it to exercise the express powers thus given. (*Franklin Nat. Bank v. Whitehead*, 302.)

2. LAW, KNOWLEDGE OF.—ONE DEALING WITH A CORPORATION organized for the purpose of carrying on manufactur-

ing and mining is bound to know that it had no power to carry on the business of a public or private warehouseman or to issue warehouse receipts, and that a public warehouseman has no authority to issue receipts on his own property in his public warehouse as security for his own debt or the debts of others. (Franklin Nat. Bank v. Whitehead, 302.)

3. A CORPORATION MAY URGE THE DEFENSE OF ULTRA VIRES as against its contract forbidden by statute or contrary to public policy, though it has received the benefit thereof. (Franklin Nat. Bank v. Whitehead, 302.)

4. CORPORATIONS—STOCKHOLDER'S LIABILITY AS DEPENDENT UPON BOOKS OF.—If, upon the books of a national banking corporation, one appears to be the owner of stock therein, he cannot escape liability by proving that he held it as trustee for some other person whose name and interests do not appear from such books. (Kerr v. Urle, 493.)

5. PROMISSORY NOTE—CORPORATION—SIGNATURE OF PRESIDENT AND DIRECTORS.—Where a corporation is bound by the signature of its president as such, the signing of the names of the directors as such binds the directors as individuals, the word "director" being merely descriptio personae. (Taylor v. Reger, 352.)

6. CORPORATIONS. DISSOLUTION OF. JURISDICTION OF EQUITY TO ENFORCE.—Courts of equity do not possess jurisdiction over corporate bodies to such an extent as to justify them in dissolving corporations, or in winding up their affairs and sequestering their property. (Wallace v. Pierce-Wallace Pub. Co., 389.)

7. CORPORATIONS — INSOLVENCY — PREFERENCES.—All property of an insolvent corporation is a trust fund for the benefit of all its creditors. (Cook v. Moody, 872.)

8. CORPORATIONS — INSOLVENCY — PREFERENCES. — A mortgage executed by an insolvent corporation to a creditor with knowledge of such insolvency, to enable the corporation to continue business and pay its debts by means of the extension of time of payment thus secured, constitutes a preference which may be avoided by either prior or subsequent creditors of such corporation. (Cook v. Moody, 872.)

9. CORPORATION—TRUST FUNDS.—The assets of an insolvent corporation become, from the date of its assured insolvency, a trust fund for equal distribution among its creditors. Afterward none of them can obtain priority by recovering a judgment and levying an execution against the corporation. (Memphis Barrel etc. Co. v. Ward, 825.)

10. CORPORATIONS—EXECUTIONS AGAINST INSOLVENT, NO PREFERENCE CAN BE GAINED BY.—The levy of an execution upon the property of an insolvent corporation after it has suspended business and moved to file a bill in equity for the distribution of its assets, does not create any preference in favor of the judgment creditor over other creditors who have not obtained any judgment nor levied any writ. (Memphis Barrel etc. Co. v. Ward, 825.)

11. CORPORATIONS FORMED BY PARTNERS—FRAUD UPON CREDITORS—LIABILITY ON SUBSCRIPTIONS.—If partners, under agreement, capitalize their partnership property at twice its value, organize a corporation with a capital stock of that amount, transfer such property to it at this estimated value, and, in payment of the property, issue to themselves paid-up corporate stock to an amount equal to such estimated value, make themselves officers of the corporation, continue the partnership business in the



corporate name, and subsequently become insolvent, such transaction is a fraud on subsequent innocent creditors of the corporation, although no evil intent accompanied the transaction, and the difference between the actual and inflated value of the property so conveyed must be deemed unpaid subscriptions upon the stock issued in this way whenever necessary to protect the rights of such corporate creditors. (*Gates v. Tippecanoe Stone Co.*, 705.)

12. CORPORATIONS—PUBLIC DUTIES—BILL TO ENFORCE. A bill in equity to enforce the performance of public duties by a corporation cannot be maintained by a private party in the absence of a special right or authority. (*Saylor v. Pennsylvania Canal Co.*, 749.)

13. CORPORATIONS—RIGHT OF PRIVATE PARTY TO ENFORCE PUBLIC DUTIES.—A private party cannot maintain an action to recover damages from a canal company for failure to reconstruct part of its canal destroyed by flood, on the ground that he is thus prevented from using his canal boat at a profit. The right to demand and compel the canal company to reconstruct its canal is a public right alone, and no private citizen can enforce it without especial injury to himself. (*Saylor v. Pennsylvania Canal Co.*, 749.)

14. CORPORATIONS, FOREIGN — SERVICE OF PROCESS UPON.—Service of process upon an officer of a foreign corporation while he is casually or temporarily found within the jurisdiction does not give jurisdiction to render judgment in personam against the corporation which has no place of business or agent within the state, and has never done any business therein. (*Cars- tens v. Leidigh etc. Lumber Co.*, 906.)

See Agency, 6; Assignment for Benefit of Creditors, 5; Interstate Commerce, 2-4; Receivers; Warehousemen, 2, 4, 5; Water Companies, 11.

#### COTENANCY.

1. MINGLED GRAIN—OWNERSHIP—CONTINUANCE OF.—A depositor of grain in a common receptacle until he withdraws or transfers his grain, is a tenant in common, not only while his grain is in the common store, but also as long as any grain is in the common store. (*Drudge v. Leiter*, 359.)

2. MINGLED GRAIN—PROPORTIONATE SHARE OF TENANTS IN COMMON.—The share of each tenant in common of the mingled grain on hand, at any time, will be a proportionate part of the amount on hand in the proportion which his deposit bears to the aggregate of the other deposits. (*Drudge v. Leiter*, 359.)

3. COTENANTS, LEASE BY, TO WHOM RENT MAY BE PAID.—If cotenants join in a lease reserving a common rent payable to them jointly, either may receive and give a valid receipt for the entire rent until the other gives notice that his share must be paid to him personally. (*Swint v. McCalmont Oil Co.*, 791.)

4. COTENANCY.—AN ASSIGNMENT OR GRANT BY ONE OF TWO OR MORE COLESSORS gives to his assignee or grantee the same right which he had to receive and receipt for the entire rents reserved by a lease. (*Swint v. McCalmont Oil Co.*, 791.)

See Partition; Warehousemen, 11.

#### COUNTERCLAIM.

COUNTERCLAIM—DEATH OF ONE OF THE PARTIES. In an action brought by an administrator of a decedent, the defendant may assert a counterclaim based upon a demand in his favor against the decedent, though it did not become due until

after the latter's death, if it was due when the action was commenced. (*Ainsworth v. Bank of California*, 135.)

See Executors and Administrators, 6.

## COUNTIES.

**OFFICERS—AUTHORITY OF COUNTY COMMISSIONERS.**—County commissioners have only special powers and represent the county in respect to its financial affairs, only in such matters as are distinctly provided by statute. They may pass upon claims, which for some amount are the subject of legal demand against the county, but their finding of jurisdiction is not conclusive of the fact, and they are wholly without authority to allow or sanctify an illegal demand upon the county, and such allowance is not binding thereon. (*Jones v. Commissioners of Lucas Co.*, 710.)

## COVENANTS.

**COVENANT, WHEN DOES NOT RUN WITH THE LAND.** The covenant implied in a deed of grant does not run with the land, nor impress it with any equity which will pass to the grantee. Hence, if the purchaser by a grant deed of land which is subject to a mortgage subsequently conveys it, his conveyance does not operate as an assignment to his grantee of any cause of action which he had against his grantor because of such mortgage. (*Woodward v. Brown*, 108.)

## CREDITORS' BILL.

**1. CREDITORS' BILL—EXECUTION, ISSUE, AND RETURN OF, WHEN NOT NECESSARY.**—In suits to subject lands to the payment of judgments, where it is shown that the judgment debtor is insolvent, the creditor is not compelled to incur the expense and delay incident to the issuing and return of an execution *nulla bona* as a condition precedent to the right to maintain his suit. (*O'Brien v. Stambach*, 368.)

**2. A CREDITORS' BILL ALLEGING** that the judgment debtor conveyed all the property therein described to his wife, to be held in trust for himself, is sufficient. Under such circumstances, he would remain the real owner, and his creditors, whether existing or subsequent, would be entitled to have the conveyance set aside and the lands subjected to their claims. (*Brundage v. Cheneworth*, 382.)

**3. PRACTICE.**—It is error to strike out an amendment to a creditor's bill alleging an agreement between the judgment debtor and his grantee that the latter is to hold the property conveyed to him in trust for the former. (*Brundage v. Cheneworth*, 382.)

**4. CREDITOR'S BILL—PERSONAL PROPERTY.**—While it is not usual to do so, a creditor's bill may be maintained to reach personal property which the judgment debtor has transferred for the purpose of hindering and defrauding creditors. (*O'Brien v. Stambach*, 368.)

**5. CREDITORS' BILLS—FRAUDULENT TRANSFERS—SUBSEQUENT CREDITORS.**—Where a conveyance is set aside as fraudulent at the instance of creditors existing when it was made, subsequent creditors may also share in the fruits of the litigation. (*O'Brien v. Stambach*, 368.)

**6. CREDITOR'S BILLS—STATUTE OF LIMITATIONS.**—Technically speaking, a cause of action does not accrue in favor of one who files a creditors' bill until the recovery of a judgment, and

the statute of limitations does not, therefore, commence to run until that time. (*Brundage v. Cheneworth*, 382.)

7. LACHES.—A CREDITORS' BILL CANNOT BE REGARDED AS BARRED BY LACHES where it does not appear how long the plaintiff's debt had existed before the recovery of judgment thereon, if the bill was filed within a few days after the entry of the judgment. (*Brundage v. Cheneworth*, 382.)

### CRIMINAL LAW.

1. INSANE DELUSIONS AS AN EXCUSE FOR CRIME.—If an accused had certain delusions which completely possessed him, but was perfectly sane on other subjects, he must be judged as though the facts with respect to which the delusion existed were real, and, if being real, they would not have constituted any defense, the delusions cannot amount to such defense. (*People v. Hubert*, 72.)

2. INSANE DELUSION AS A JUSTIFICATION OF CRIME.—An insane irresistible impulse is not a defense to a criminal charge. Though the criminal act is the offspring of an irresistible impulse, and the impulse was irresistible because of mental disease, still defendant must be held responsible if he, at the time, had the requisite knowledge of the nature and quality of the act and its wrongfulness. (*People v. Hubert*, 72.)

3. INSANITY—EVIDENCE IN REBUTTAL.—Though the only evidence offered on behalf of an accused was that he was insane as to certain matters, persons, and things, evidence in rebuttal, given by certain of his intimate acquaintances, that they knew nothing of his insanity is properly received, as, if he had such delusions, it is probable that they would have heard or known of them. (*People v. Hubert*, 72.)

4. INSANITY—EVIDENCE, WHAT ADMISSIBLE.—A witness who had a business acquaintance and conversation with the accused may be permitted to testify that he was sane as a business man. Upon the question of admitting evidence of this character a very large discretion is usually allowed to the trial court. (*People v. Hubert*, 72.)

### CUSTODY OF LAW.

See Execution, 12.

### CUSTOM.

1. A CUSTOM CANNOT BE GOOD unless it is reasonable. (*Dempsey v. Dobson*, 809.)

2. CUSTOM, WHEN UNREASONABLE AND THEREFORE VOID.—A custom or usage prevailing in the business of carpet making by which the result of a color mixer's skill and labor in the service of his employer are recognized as belonging exclusively to the employé, is unreasonable, and therefore void. (*Dempsey v. Dobson*, 809.)

### DAMAGES.

1. WILLFUL INJURY—COMPLAINT—NECESSARY AVERMENT.—A complaint cannot proceed both as a complaint for negligence, and a complaint for willful injury. To be good for willful injury it must aver that the act was willfully and purposely done. (*Kalen v. Terre Haute etc. R. R. Co.*, 343.)

2. DAMAGES—MENTAL ANGUISH—POLICY OF THE LAW. While mental sufferings may be real, and the injuries resulting



therefrom be properly regarded as naturally or directly resulting from the act causing the suffering as their proximate cause, still every injurious effect of wrong cannot form the basis of damages, and claims for redress on such grounds seem to be out of the wise policy of the law. (*Kalen v. Terre Haute etc. R. R. Co.*, 343.)

See Appeal, 18; Municipal Corporations, 11.

### DEBTOR AND CREDITOR.

1. DEBTOR AND CREDITOR—PREFERENCES—CONFESSION OF JUDGMENT.—A debtor may secure his creditor by a confession of judgment in his favor. (*Braden v. O'Neil*, 761.)

2. DEBTOR AND CREDITOR—PREFERENCES—CONFESSION OF JUDGMENT—FRAUD.—Confession of judgment by a debtor to secure a contingent liability to his creditor is not a fraud in law, and whether a fraud in fact depends on the surrounding circumstances. (*Braden v. O'Neil*, 761.)

3. DEBTOR AND CREDITOR—PREFERENCES—CONTINGENT LIABILITY—CONFESSION OF JUDGMENT.—An indorser of a note is contingently liable to the holder thereof and may secure him by a confession of judgment. (*Braden v. O'Neil*, 761.)

See Fraudulent Conveyances; Partnership, 4-6; Receivers, 13.

### DEEDS.

See Conveyances.

### DEFINITIONS.

1. DEFINITION.—“COMMODITY IS THAT which affords advantage or profit. (*Beechley v. Mulville*, 479.)

2. DEFINITIONS.—PERPETUITY is a limitation, in an instrument, taking the subject matter of the perpetuity out of commerce for a period of time greater than a life or lives in being and twenty-one years thereafter. (*Bigelow v. Cady*, 230.)

Charitable Trust. (*Hoeffler v. Clogon*, 241.)

Charity. (*Hoeffler v. Clogon*, 241.)

Common Law. (*Cowhick v. Shingle*, 17.)

“Debts.” (*Snyder v. State*, 160.)

General Agent. (*Hartford Fire Ins. Co. v. Keating*, 499.)

Office. (*State v. Hocker*, 174.)

Prepay Station. (*Bird v. Railroads*, 856.)

“Publication of Book.” (*Jewelers' Mercantile Agency v. Jewelers' etc. Co.*, 666.)

Public Office. (*State v. Jennings*, 723.)

Warehouseman. (*Franklin Nat. Bank v. Whitehead*, 302.)

### DELIVERY BOND.

See Attachment, 3, 4.

### DEPOSITIONS.

See Appeal, 6; Trial, 12.

### DEVISE.

1. DEVISE—CLAUSE SHOWING AN INTENT TO CREATE A PERPETUITY.—An intent to create a perpetuity is manifested by a clause of a devise in trust, which provides for the appointment of trustees “for all time to come.” (*Bigelow v. Cady*, 230.)

2. PERPETUITIES.—A devise of an estate to A for life with remainder to B does not suspend the power of alienation for a period

longer than two lives in being, and hence does not create a perpetuity. (*Defreese v. Lake*, 584.)

3. **DEVISE—WHEN VOID AS CREATING A PERPETUITY.**—A devise in trust, providing how the proceeds of any lands sold shall be disposed of, but which makes no provision for the vesting of the fee in any one, at any time, and which does not fix any time when such proceeds shall be paid to any one, is void, as creating a perpetuity. (*Bigelow v. Cady*, 230.)

4. **DEVISE—WHEN VOID AS CREATING A PERPETUITY.**—A devise is void if there is a possibility that a violation of the rule against perpetuities can happen, whether it creates a legal or a trust estate. (*Bigelow v. Cady*, 230.)

5. **DEVISE, ASSENT TO OR ACCEPTANCE OF.**—If the acceptance of a devise may be presumed, the presumption is not conclusive, and such acceptance is necessary to vest title in the devisee. (*Defreese v. Lake*, 584.)

6. **DEVISE, RENUNCIATION OF, HOW MAY BE PROVED.**—Evidence that a devisee of a life estate in expectancy, before he became entitled to possession, purchased the property, at a tax sale, and thereafter claimed and conveyed in fee, is admissible as tending to show that he never accepted the devise, but, on the contrary, renounced it. (*Defreese v. Lake*, 584.)

7. **ESTATES OF DECEDENTS, SALE OF, WHEN CANNOT BE RESISTED.**—One who is devised real property in consideration of services to be rendered by him as guardian of the minor child of a decedent, and who is appointed and renders services as such guardian, cannot resist an application by creditors of the decedent for the sale of lands so devised to pay debts. (*Pearson v. Gillenwaters*, 844.)

See Estates, 1.

## DISTRIBUTION.

1. **ESTATES OF DECEDENTS.—A DECREE OF DISTRIBUTION** by virtue of which property is distributed to trustees is conclusive respecting their powers and duties. Though the decree purports to distribute the property in accordance with the terms of the will, the rights of the parties must thereafter be measured by the terms of the decree and not by those of the will. The will can no more be used as evidence to impeach the decree than can any other evidence upon which a judgment is rendered. (*Goad v. Montgomery*, 145.)

2. **ESTATES OF DECEDENTS—CONFLICT BETWEEN WILL AND DECREE OF DISTRIBUTION.**—In granting a decree of distribution the court must give construction as to the terms of the will. The decree, when entered, supersedes the will and prevails over any provision therein which may be thought inconsistent with the decree. (*Goad v. Montgomery*, 145.)

## DOMICILE.

See Marriage and Divorce, 10.

## DOWER.

**DOWER—WHEN WIFE'S ACCEPTANCE OF DEVISE IS NO BAR.**—If a husband devises a life estate to his wife without any express provision in the will that such estate shall be in lieu of dower, her acceptance of the devise does not bar her right to a distributive share of his estate owned by him at the time of his death. (*Sutherland v. Sutherland*, 477.)

**EJECTMENT.**

**EJECTMENT.**—**EQUITABLE ESTOPPELS** are proper defenses in ejectment and are admissible under the plea of not guilty. (*Hagan v. Ellis*, 167.)

**EQUITY.**

1. **EQUITY—WHICH ONE OF TWO INNOCENT PARTIES MUST SUFFER.**—If one of two innocent parties must suffer, he through whose agency the loss occurred must bear it. (*Day v. Brenton*, 460.)

2. **EQUITY—DISMISSAL—REMEDY AT LAW.**—Under a statute which provides, in effect, that an error as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings, and a transfer to the proper docket, the fact that an action at law is the proper remedy upon a certain contract is no ground for the dismissal of a suit, in equity, upon such contract. (*Swift v. Calnan*, 443)

See Corporations, 6, 12.

**ESTATES.**

1. **LIFE ESTATE, WHEN CREATED.**—A devise of property to testator's son and after his decease to belong to his heirs, gives him an estate for life only. (*Defreese v. Lake*, 584.)

2. **REMAINDERS ARE** descendible devises and alienable in the same manner as estates in possession. (*Defreese v. Lake*, 584.)

3. **TAXES, ANNUAL—LIFE TENANT MUST PAY.**—A life tenant of lands must pay the annual taxes upon the property, as the benefits for which they are exacted are realized from year to year, and it is just that the owner of the life estate should pay them. (*Huston v. Tribbetts*, 275.)

4. **TAXES—SPECIAL ASSESSMENT FOR PERMANENT IMPROVEMENT—WHO MUST PAY.**—A special assessment for a local and permanent improvement, such as the construction of a large ditch for drainage purposes, should be borne ratably by the life tenant and remainderman in proportion to the benefit accruing to each, where such improvement increases the value of the remainder; but a special assessment for an improvement of the temporary character should be borne by the life tenant. (*Huston v. Tribbetts*, 275.)

5. **A LIFE TENANT OF REAL PROPERTY** owes both the estate and the remainderman the duty of paying taxes thereon, and therefore cannot acquire title in fee by letting the premises be sold for taxes and then bidding them in. (*Defreese v. Lake*, 584.)

6. **LIFE TENANTS AND REMAINDERMEN.**—If there is an encumbrance upon land, either the life tenant or the remainderman may purchase it, but cannot hold it to the exclusion of the other, who is willing to contribute his share of the amount paid for the purchase. This rule is applicable to a life estate in expectancy. (*Defreese v. Lake*, 584.)

7. **LIFE TENANT AND REMAINDERMAN—ENCUMBRANCE.** As between a life tenant in possession and the remainderman, the former is bound to pay the interest and the latter the principal of any encumbrance to which the estate of both is subject. (*Damm v. Damm*, 601.)

8. **LIFE TENANT IN EXPECTANCY AND REMAINDERMAN—ENCUMBRANCE.**—If an encumbrance exists to which the interest of a life tenant in expectancy, and also that of the remainderman, is subject, but which does not affect the life tenant in possession, and such encumbrance is discharged by the remainderman,



the life tenant in expectancy is liable to contribute his proportion of the amount so paid, to be computed on the basis of the relative value of the estates. In making this computation the owner of the expectant life estate should be charged his share of the interest according to his expectancy up to the time when his estate becomes one in possession, and all the interest which will accrue after that time, and during the continuance of his estate, but in estimating such interest, consideration must be given the fact that it is to accrue and become payable at a future time. The expectancy of the life of the parties is involved, and that is to be determined from evidence of their age, health, and habits, aided by life tables. (*Damm v. Damm*, 601.)

See Conveyances, 1; Taxes, 4.

#### ESTATES OF DECEDENTS.

See Devise, 7; Distribution, 12; Executors and Administrators, 7.

#### ESTOPPEL.

**EQUITABLE ESTOPPEL—FORCE OF.**—Where plaintiff held equitable title for thirty years without asserting his claim and then his equitable title is converted into a legal title, he being estopped from asserting his equitable title is also estopped from asserting his legal title. (*Hagan v. Ellis*, 167.)

See Checks, 2; Ejectment; Insurance, 15; Warehousemen, 10.

#### EVIDENCE.

1. **EVIDENCE.—LIFE TABLES ARE NOT CONCLUSIVE** evidence of the expectancy of life of any given person, but are considered in the light of, and subject to, variation by proof concerning, the health and habits of the person whose expectancy is in question. (*Damm v. Damm*, 601.)

2. **EVIDENCE.**—One who has taken notes of evidence is competent to testify therefrom, though he retains no recollection of the matter testified to, if he knows that the notes, when taken, were correct. (*O'Brien v. Stambach*, 368.)

3. **EVIDENCE TAKEN BEFORE A REFEREE, ADMISSIBILITY OF.**—One who acts as referee is competent to testify to testimony of the parties taken before him, whether he was regularly appointed or not, in so far as their testimony consisted of admissions, because such admissions, if otherwise relevant, are admissible whether made under oath or not. (*O'Brien v. Stambach*, 368.)

4. **EVIDENCE. TELEPHONE MESSAGE.**—Where a witness claims that he had a conversation over the telephone with a representative of the plaintiff, he cannot, in support of his statement of such conversation, prove what he repeated at the time to a third person as the answers received over the telephone. (*German Sav. Bank v. Citizens' Nat. Bank*, 399.)

5. **EVIDENCE. VARYING OR CONTRADICTING WRITING, WHAT IS NOT.**—Though a promissory note is made in favor of one person, parol evidence is admissible to prove that he was merely a trustee for another, and that the note was given in consideration of medical services rendered by the latter, and was accompanied by a parol agreement that it should be paid out of the proceeds of certain life or endowment policies to which the maker might become entitled. (*Murphy v. Skyles*, 411.)

See Agency, 1; Banks and Banking, 23; Criminal Law, 3, 4; Devise, 6; Landlord and Tenant; Marriage and Divorce, 6; Master and Servant, 10; Trial, 10, 11; Wills.

#### EXECUTIONS.

1. **EXECUTIONS — SHERIFF'S SALES — SETTING ASIDE.**

The setting aside, or refusal to set aside, a sheriff's sale, is in the sound discretion of the lower court, and unless there is a manifest and gross abuse of that discretion, the appellate court will not disturb the decree. (*Stroup v. Raymond*, 758.)

2. JUDICIAL SALES.—SHERIFF'S SALES cannot be set aside for mere inadequacy of price. (*Stroup v. Raymond*, 758.)

3. EXECUTIONS—SHERIFF'S SALES—AGREEMENT AS TO BIDDING—FRAUD.—An agreement among a portion of the creditors to buy their debtor's property at sheriff's sale, and to manufacture and sell it, dividing the proceeds, is not fraudulent, if it does not prevent competition at such sale, nor depress the price. (*Braden v. O'Neil*, 761.)

4. EXECUTIONS—SHERIFF'S SALES—SETTING ASIDE FOR MUTUAL MISTAKE.—A sheriff's sale is properly set aside when it appears that all of the parties interested mistakenly supposed that the purchase was subject to a mortgage, which belief caused the property to be sold for a grossly inadequate price. (*Stroup v. Raymond*, 758.)

5. EXEMPTION LAWS ARE TO BE LIBERALLY CONSTRUED to carry into effect the purposes for which they were enacted, among which is the protection in the hands of any debtor of the means of earning a livelihood. (*Equitable Life etc. Soc. v. Goode*, 378.)

6. EXECUTION, WHAT NOT SUBJECT TO.—THE RIGHT to place and keep in a college one pupil, who shall have the right to board, tuition, and all other advantages of a college free of charge, is not subject to be seized for debt. (*Bank v. Morrow*, 853.)

7. EXEMPTIONS.—A lawyer may hold his law library and his ordinary office furniture exempt from execution, though he does not habitually earn his living by their use. (*Equitable Life etc. Soc. v. Goode*, 378.)

8. EXEMPTIONS IN FAVOR OF LAWYER, WHO ENTITLED TO.—One who has been duly admitted to the practice of the law, and does law business for certain corporations with which he is connected, and draws agreements and other legal papers, is entitled to retain his law library, office furniture, and supplies, though he is engaged in other business, tries no cases, and does not have out a sign, nor otherwise advertise as a lawyer. (*Equitable Life etc. Soc. v. Goode*, 378.)

9. EXEMPTION—COMBINED HARVESTER.—Under a statute exempting farming utensils and implements of husbandry of the judgment debtor, he may hold as exempt a combined harvester costing fifteen hundred dollars, though comparatively few farmers own such a harvester. Under this statute the value of the property claimed as exempt is not material. (*Estate of Klemp*, 69.)

10. EXEMPTION OF LIFE INSURANCE, WAIVER OF IN ADVANCE.—An agreement at the time of incurring indebtedness to pay it out of the proceeds of life or endowment insurance is a waiver of the statutory right to hold the proceeds of such insurance exempt from execution. (*Murphy v. Skyles*, 411.)

11. EXEMPTION OF PROCEEDS OF LIFE INSURANCE AGAINST DEBTS OF BENEFICIARY OR ASSIGNEE.—Though the constitution provides that policies of insurance on the life of an individual shall inure to the separate use of the husband or wife or children of such individual, independently of his or her creditors, and an endowment policy payable to the assured on his attaining a certain age shall be exempt from liability for any of his or her debts, such exemption applies only against debts of the assured. Hence, if he turns over such moneys to his wife, they

are subject to execution issued on a judgment against her. Exemption rights are personal, and cannot ordinarily be transmitted by sale or gift. (*Murdy v. Skyles*, 411.)

12. EXECUTIONS—LEVY UPON PROPERTY IN THE CUSTODY OF THE LAW.—When an officer of the law, acting under police rules or without them, takes from his prisoner personal property either for safekeeping or to remove from his control that which he might use in effecting his escape, it is not subject to seizure under civil process. It is not necessary to the application of the rule that the property in question should be connected with a criminal charge. (*Hill v. Hatch*, 822.)

See *Creditor's Bill*, 1; *Insurance*, 12, 13.

## EXECUTORS AND ADMINISTRATORS.

1. ADMINISTRATORS, LIABILITY OF.—An administrator is not chargeable with the loss resulting from his keeping, without sale, bank stock, when he acted in good faith, under the advice of counsel, and with a sincere desire to properly discharge the duties of his office. (*Pearson v. Gillenwaters*, 844.)

2. AN ADMINISTRATOR ACTING UNDER THE ADVICE OF COUNSEL is protected, particularly when such advice is as to the advisability of bringing or defending suits. (*Pearson v. Gillenwaters*, 844.)

3. ADMINISTRATORS, LOSS RESULTING FROM FOLLOWING ADVICE OF PERSONS INTERESTED IN THE ESTATE.—If an administrator, at the request of persons beneficially interested, or under their advice, delays the sale of personal property, in consequence of which loss is suffered, he cannot, at the instance, or for the benefit, of such interested parties, be charged with such loss. (*Pearson v. Gillenwaters*, 844.)

4. EXECUTORS OR TRUSTEES—POWERS OF SURVIVORS. When a will confers a power on the testator's executors or their successors, the survivor of them may execute the power. (*Murphy's Estate*, 802.)

5. POWERS—EXERCISE OF, BY AN ADMINISTRATOR SUCCEEDING AN EXECUTRIX WHO RESIGNS.—If an executrix resigns, she no longer has a right to exercise a discretionary power, conferred by the will, to sell land, and the appointment of an administrator, with the will annexed, does not confer upon him the right to exercise the power to sell that which was given by the provisions of the will to the executrix named therein. (*Bigelow v. Cady*, 230.)

6. ESTATES OF DECEDENTS—TITLE OF THE ADMINISTRATOR TO CHOOSE IN ACTION—SETOFF.—Upon the appointment of an administrator, all choses in action in favor of his intestate pass to him immediately, but subject to any right of set off or counterclaim existing in favor of the debtor. (*Ainsworth v. Bank of California*, 135.)

7. ESTATES OF DECEDENTS—SALE OF PROPERTY, WHEN SHOULD BE ORDERED.—When a deficiency in the assets necessary to pay the debts of a decedent exists, a sale of his real property will be directed. (*Pearson v. Gillenwaters*, 844.)

8. EXECUTORS AND ADMINISTRATORS—TERM "DEBTS" INCLUDES WHAT.—The term "debts," as used in statutes relating to the estates of deceased persons, is not limited to such as are strictly legal debts, but manifestly includes every claim and demand by a creditor, whether recoverable at law or in equity. (*Snyder v. State*, 60.)



**9. ADMINISTRATORS, ORDER FIXING FEES OF, WHEN NOT FINAL.**—A finding of a clerk and master on a reference as to the amount which should be paid an administrator for his services is not equivalent to the finding of a jury, and does not preclude the court, on appeal, from fixing the amount of such compensation at a less sum than that fixed by the clerk and master. (*Pearson v. Gillenwaters*, 844.)

See Appeal, 3; Counterclaim; Trusts, 12.

#### EXEMPTIONS.

See Execution; Municipal Corporations, 10.

#### FORGERY.

See Agency, 8; Banks and Banking, 3, 5, 7; Checks, 2.

#### FRAUD.

See Sales, 2; Suretyship, 2.

#### FRAUDULENT BANKING.

See Banks and Banking; Witnesses, 2.

#### FRAUDULENT CONVEYANCES.

**1. A CONVEYANCE WHICH IS MERELY VOLUNTARY, and which is free from fraudulent intent on the part of the grantor, may not be attacked by a subsequent creditor.** (*Brundage v. Cheneworth*, 382.)

**2. FRAUDULENT TRANSFER, SUBSEQUENT CREDITORS, WHEN MAY NOT IMPEACH.**—A conveyance actually and intentionally fraudulent as to existing creditors cannot, as a general rule, be impeached by subsequent creditors. (*Brundage v. Cheneworth*, 382.)

**3. FRAUDULENT CREDITORS—SUBSEQUENT CREDITORS, WHEN MAY IMPEACH.**—If a conveyance is actually fraudulent as to existing creditors, and merely colorable, and the property is held in secret trust for the grantor, who is permitted to use it as his own, it will be set aside at the instance of subsequent creditors. They may also successfully attack a conveyance made with intent to become indebted, or with an express purpose to defraud those who may thereafter become the grantor's creditors. (*Brundage v. Cheneworth*, 382.)

**4. FRAUDULENT TRANSFERS — CREDITORS' BILLS — PROPERTY OF DEBTOR IN ANOTHER STATE.**—Though a judgment debtor has property in another state subject to execution, his creditors are not required to go beyond the state of their residence in search of that property, before they have proceeded in the state of his and their residence to subject to their judgments property transferred in fraud of his creditors. (*O'Brien v. Stambach*, 368.)

See Creditor's Bill, 5; Partnership, 5, 6.

#### GASWORKS.

See Municipal Corporations, 4-6.

#### HOMESTEAD.

**HOMESTEAD—LAND APART FROM THE HOME TRACT.** The head of a family cannot hold as a part of his homestead a detached tract of land used and cultivated as a part of the home farm, though both tracts do not in quantity exceed the limit allowable for a homestead. (*Brandies v. Perry*, 164.)

**HOMICIDE.**

1. **INSANITY.—INSTRUCTIONS** as to justification of homicide on account of an insane delusion are properly refused when there is no evidence tending to prove such delusion. (People v. Hubert, 72.)

2. **INSANITY—INSTRUCTIONS TO THE JURY CONCERNING INSANE DELUSIONS.**—It is not proper to instruct the jury that certain beliefs, which the defendant claims constituted a delusion, impelling him to commit a homicide, were, if entertained by him and unsound, existing only in the imagination, insane delusions as a matter of law. Matters of science are always to be proved; they are not treated as matters of fact, and the court should not instruct in regard to them. (People v. Hubert, 72.)

**HUSBAND AND WIFE.**

1. **HUSBAND AND WIFE ARE JOINTLY AND SEVERALLY LIABLE**, by the statutes of Iowa, for family expenses, as for medical services rendered the husband. (Murphy v. Skyles, 411.)

2. **HUSBAND AND WIFE—FORFEITURE BY HER OF HER RIGHT TO HER PROPERTY.**—If a wife intrusts her husband with moneys without any expectation that they will be returned, or that the property purchased therewith shall be hers, she forfeits her rights thereto as against his creditors, and if he subsequently makes a bill of sale to her of property purchased with her moneys merely for the purpose of shielding her from the assaults of his creditors, it cannot accomplish that purpose. (O'Brien v. Stambach, 368.)

3. **A MARRIED WOMAN IS CAPABLE OF ACQUIRING STOCK**, and being a stockholder, in a national bank, whether doing business in the state of her residence or in another state. (Kerr v. Urie, 493.)

**See Banking, 27; Marriage and Divorce; Mortgage, 1.**

**ICE.**

**See Waters and Watercourses, 4, 5.**

**INDICTMENT.**

**See Banking, 20.**

**INNUENDO.**

**See Slander, 5.**

**INSANITY.**

**See Criminal Law, 1-4; Homicide, 1, 2; Marriage and Divorce, 5-7; Wills.**

**INSOLVENCY.**

**See Corporations, 7-11; Partnership, 1, 7; Receivers.**

**INSTRUCTIONS.**

1. **REASONABLE DOUBT.**—To tell the jury that a reasonable doubt is a fair doubt is to give an explanation which does not explain; but such instruction is not prejudicial. (People v. Hubert, 72.)

2. **AN INSTRUCTION TO A JURY** that, after weighing the evidence, they must decide according to their consciences is not prejudicial to the accused. It is only equivalent to telling them to weigh the evidence and decide conscientiously. (People v. Hubert, 72.)

**3. INSTRUCTIONS—CORRECT STATEMENT OF LAW, STANDING ALONE—EVIDENCE.**—If part of an instruction is a correct statement of the law, it is not erroneous, though there is no evidence to which it, standing alone, can apply, if it aids to make plain that which follows in the instruction. (*State v. Elfert*, 433.)  
See Homicide, 1, 2; Negligence, 5; Rape, 3-5; Suretyship, 3; Wills, 17.

### INSURANCE.

**1. DEFINITIONS.**—INSURANCE IS A "COMMODITY" within the meaning of a statute which prohibits any pool, trust, agreement, combination, or confederation with any partnership, corporation, or individual to regulate or fix the price of oil, lumber, coal, grain, flour, provisions, "or any other commodity or article whatever." (*Beechley v. Mulville*, 479.)

**2. INSURANCE.**—AN INSURABLE INTEREST EXISTS ONLY when the insured has such an interest in the property that its destruction will result in pecuniary loss to him. If he has such an interest, it is not necessary that he should have the title. (*Hartford Fire Ins. Co. v. Keating*, 499.)

**3. INSURANCE.**—AN INSURABLE INTEREST NEED NOT BE PERSONAL, but may be an interest existing in the insured as trustee, agent, administrator, judgment creditor, and the like. (*Hartford Fire Ins. Co. v. Keating*, 499.)

**4. INSURANCE—INSURABLE INTEREST—ATTORNEYS.**—If a policy of insurance on real property is made payable to A and B, attorneys, as their interest may appear, and it is shown that such property has been sold at a judicial sale, and part only of the purchase price paid, and that such attorneys represent the plaintiff in the suit to whom the balance of the purchase money was due, such attorneys and those whom they represent had an insurable interest in the property, and the payment of loss cannot be avoided for want of such interest on the part of such attorneys. (*Hartford Fire Ins. Co. v. Keating*, 499.)

**5. INSURANCE—UNCONDITIONAL AND SOLE INTEREST, WHAT IS.**—One who has purchased property at a judicial sale, but whose bid has not been ratified, nor the sale confirmed by the court, has not an unconditional and sole interest therein. (*Hartford Fire Ins. Co. v. Keating*, 499.)

**6. INSURANCE.**—TO BE UNCONDITIONAL AND SOLE AN INTEREST must be completely vested in the assured, not contingent or conditional, nor for others, or for life only, nor in common, but of such nature that the assured must sustain injury or loss if the property is destroyed, and this is so whether the interest is legal or equitable. (*Hartford Fire Ins. Co. v. Keating*, 499.)

**7. INSURANCE.**—STATEMENTS RESPECTING THE NATURE AND EXTENT of the interest of the insured are material, and must be construed so as to effectuate the purposes of the parties. (*Hartford Fire Ins. Co. v. Keating*, 499.)

**8. IF INSURANCE IS MADE payable to a mortgagee as his interest may appear, he is not entitled to recover if the assured is not.** Hence, no recovery can be had for his benefit if the premises are burned by the insurer for the purpose of realizing upon the insurance. (*Hocking v. Insurance Co.*, 862.)

**9. INSURANCE—INCREASE OF HAZARD.**—CHANGES in the form of an existing lien do not, as a matter of law, amount to an increase of hazard. (*Greenlee v. North British etc. Ins. Co.*, 455.)

**10. INSURANCE—CHANGE OF RISK—INCREASE OF HAZARD.**—Proof of a change of risk is not proof of an increase of haz-



ard, without it appears that the change has increased the hazard. (*Greenlee v. North British etc. Ins. Co.*, 455.)

11. **INSURANCE—INCREASE OF RISK.—THE BURDEN** of proving an increase of risk is on the insurer. (*Greenlee v. North British etc. Ins. Co.*, 455.)

12. **INSURANCE—MECHANICS' LIEN—INCREASE OF HAZARD—EXECUTION SALE.**—If property against which mechanics' liens have been filed is insured, the policy for bidding any increase of hazard, a foreclosure of the liens, and a sale of the property under execution, do not, in the absence of evidence, show any increase of hazard. (*Greenlee v. North British etc. Ins. Co.*, 455.)

13. **INSURANCE—AGENT—APPARENT AUTHORITY OF.**—An agent of the insurer sent to view the premises and investigate the loss has apparent authority to waive the furnishing of proofs of loss. (*Hartford Fire Ins. Co. v. Keating*, 499.)

14. **INSURANCE—GENERAL AGENT, WHO IS.**—One supplied with policies and blanks and given authority to issue them, and who, in fact, signs, issues, and delivers policies, and receives and accounts for premiums, is a general agent of the insurer in the matter of soliciting and accepting risks and agreeing upon terms and contracts of insurance. (*Hartford Fire Ins. Co. v. Keating*, 499.)

15. **INSURANCE—ESTOPPEL BECAUSE OF KNOWLEDGE OF AGENT.**—If a general agent of the insurer has, at the issue of a policy by him, full knowledge that the assured is not the unconditional and sole owner of the property, his principal is estopped, after a loss, from asserting the want of such knowledge as a defense. (*Hartford Fire Ins. Co. v. Keating*, 499.)

16. **INSURANCE—STIPULATIONS AGAINST WAIVERS BY AGENTS.**—Though a policy of insurance provides that no officer, agent, or other representative of the company shall have power to waive any provision or condition therein, except such as by the terms of the policy may be indorsed thereon or added thereto in writing, such restriction does not apply to the making of the contract, but only to matters arising after it has become effective. (*Hartford Fire Ins. Co. v. Keating*, 499.)

17. **INSURANCE—PROOFS OF LOSS—WAIVER.**—If there is such conduct on the part of the insurer or his agent as induces the assured reasonably to believe that proofs of loss were not to be demanded, and he, acting under such belief, failed to furnish such proof in the time required by the policy, the insurer cannot take advantage of such failure. (*Hartford Fire Ins. Co. v. Keating*, 499.)

18. **INSURANCE—PROOFS OF LOSS—WAIVER OF, WHAT IS.**—If, after a loss, an agent of the insurer examines into the circumstances of the loss and the value of the property, and states that he will send a check for the amount of the policy, and the assured therefrom understands that he will not be required to furnish proofs of loss, as stipulated for in the policy, the payment of the loss cannot be resisted because of the failure to furnish such proofs. (*Hartford Fire Ins. Co. v. Keating*, 499.)

19. **INSURANCE, ACCIDENT LIMITING TIME FOR SUIT.**—It is lawful for the parties to a contract of insurance, by a provision inserted therein, to reduce or limit the time within which an action may be brought upon such contract, provided a reasonable time remains, after that allowed for the performance of conditions precedent, in which to bring suit; and, if the time limited is one year from the happening of an injury, a reasonable time remains for bringing suit where the plaintiff has more than five months in which to commence suit within the time limited after the cause of

action has matured, and eight months after the company has denied its liability. (*McFarland v. Railway Officials' etc. Assn.*, 29.)

20. **INSURANCE, ACCIDENT—TIME LIMITED FOR SUIT COMMENCES AT DEATH OF INSURED.**—If a policy, insuring against death by accident, limits the time for bringing an action thereon to "one year from the date of the happening of the alleged injury," and the insured dies from injuries against which he has been insured, the limitation begins to run from his death, and not from the time that an action is maintainable, although the policy fixes a time for furnishing proofs of death, and provides that no action shall be commenced until ninety days after the proofs required are furnished. It follows, therefore, that the date of the limitation cannot be postponed by the fact that the proofs have been furnished within the time required, and that the company has, within such time, finally refused to pay. (*McFarland v. Railway Officials' etc. Assn.*, 29.)

21. **INSURANCE—MECHANICS' LIENS—CHANGE OF INTEREST—EXECUTION SALE—REDEMPTION.**—If property against which mechanics' liens have been filed is insured, the policy forbidding "a change in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or by voluntary act of the insured, or otherwise," a foreclosure of the liens, a sale of the property under execution, and the issuance of a certificate of purchase to the judgment creditor, before the loss, do not change the interest of the insured, where the period of redemption had not expired at the time of the fire. (*Greenlee v. North British etc. Ins. Co.*, 455.)

See Conspiracy, 2, 3; Execution, 10, 11.

### INTEREST.

1. **INTEREST—EFFECT OF PAYMENT OF IN ADVANCE.**—If a creditor, without inadvertence or mistake, receives a payment of interest in advance on a note of his debtor, and does not expressly reserve the right to sue before the expiration of the period for which interest is taken, a contract is thereby created to extend the time of payment during the period for which the interest is paid. (*Bank of British Columbia v. Jeffs*, 875.)

2. **INTEREST—PAYMENT OF IN ADVANCE—FORBEARANCE TO SUE.**—A contract to forbear to sue, arising from the payment and acceptance of interest in advance, is not avoided by the fact that it had been the custom of the debtor to pay interest from month to month, sometimes in advance and sometimes not, and that at the time of the payment in dispute there had been no request for an extension of time by the debtor, nor reservation by the creditor of the right to sue. (*Bank of British Columbia v. Jeffs*, 875.)

See Banks and Banking, 10.

### INTERSTATE COMMERCE.

1. **INTERSTATE COMMERCE—STATE TAXATION OF.**—Every tax on interstate commerce is a burden thereon, and, if imposed by the legislature of a state, is illegal. (*McNaughton Co. v. McGill*, 610.)

2. **INTERSTATE COMMERCE CARRIED ON BY CORPORATIONS** is entitled to the same protection which is given to such commerce when carried on by individuals. (*McNaughton Co. v. McGill*, 610.)

3. **INTERSTATE COMMERCE.—IF A FOREIGN CORPORATION** is engaged in a business which is strictly interstate com-

merce, no law of a state can control or restrict such commerce by exacting conditions for permitting the corporation to do such business within the state. (*McNaughton Co. v. McGirl*, 610.)

4. **INTERSTATE COMMERCE—FOREIGN CORPORATIONS.** The purchase of wool by an agent of a foreign corporation in one state, for transportation to another state wherein the corporation does its business, is a transaction directly pertaining to interstate commerce, which such corporation is entitled to engage in, without complying with a statute of the former state exacting conditions for the right to do business therein. (*McNaughton Co. v. McGirl*, 610.)

#### INTERVENTION.

**PLACE OF TRIAL—INTERVENTION.**—Where an action was properly brought in the county in which the defendants resided, and an intervention was allowed in favor of a party who may be liable to the defendant in the event of a recovery against him, the intervenor is not entitled to an order changing the place of trial to the county of his residence. (*German Sav. Bank v. Citizens' Nat. Bank*, 399.)

#### JOINT LIABILITY.

See **Limitations of Actions**, 4; **Negotiable Instruments**, 1.

#### JUDGMENT.

1. **JUDGMENTS, FORM OF.**—A judgment against "said defendants," the title of the case being stated, is sufficient. An obscure judgment entry may be construed with reference to the pleadings and record. (*First Nat. Bank v. Garland*, 597.)

2. **A JUDGMENT RENDERED ON SUNDAY** is not erroneous merely, it is void. (*Styles v. Harrison*, 824.)

3. **JUDGMENTS.—A WARRANT OF ATTORNEY** purporting to give authority to confess judgments in courts beyond, as well as within the limits, of the state where it is executed, is not void. It confers authority to confess judgment in that state, whatever be its effect elsewhere. (*First Nat. Bank v. Garland*, 597.)

4. **JUDGMENT BY CONFESSION.**—A statute providing that judgment shall be entered only upon the filing of a verified complaint, and the issuing of summons, does not apply to a case where a warrant of attorney is given expressly permitting judgment without process. (*First Nat. Bank v. Garland*, 597.)

5. **JUDGMENT — AMENDMENT OF THE RECORD NUNC PRO TUNC IN SUPPORT OF.**—An affidavit of the service of summons may be amended two years after the entry of the default, so as to show that the person making the affidavit was qualified to serve the summons, and the order allowing such amendment may be made *ex parte*. (*Woodward v. Brown*, 108.)

6. **JUDGMENTS, PAYMENT OF, PRESUMPTION AS TO.**—Judgments are *prima facie* evidence of indebtedness, and he who claims them to be paid must assume the burden of proof. (*O'Brien v. Stambach*, 368.)

7. **JUDGMENTS.—PAYMENTS MADE BEFORE JUDGMENT** was entered are concluded by it, and payments thereon after its entry must be pleaded, if relied upon as a defense to a subsequent action. (*O'Brien v. Stambach*, 368.)

8. **RES JUDICATA.—IF IN AN ACTION BY A PUBLIC OFFICER** to recover a salary the court determines that his office is a salaried office, and, as a consequence, that he is entitled to a designated salary only, he cannot, in a subsequent action for salary afterward accruing, recover a larger sum on the ground that in the



first action the statute entitling him to a greater compensation was neither pleaded nor referred to in argument. (*Bell v. County of Allegheny*, 795.)

9. RES JUDICATA—FAILURE TO INTERPOSE DEFENSE OF DURESS OR FRAUD.—If a decree dismissing a bill is pleaded in a second suit as *res judicata*, and the party against whom it is so pleaded claims that it was procured by duress or fraud, he must assert that defense in reply, and after the decision that such first decree is *res judicata*, he cannot maintain a third suit for relief from it on the ground of fraud or duress, and that because of his failure to before plead it, it has not become *res judicata*. It was his duty to plead it in the second suit. (*Royston v. Horner*, 510.)

10. JUDGMENT—RES JUDICATA—FINALITY OF ADJUDICATION.—A matter, whether consisting of one or many questions, which has been solemnly adjudicated by a court of competent jurisdiction, must, in any subsequent litigation between the same parties, where the same question or questions arise, be deemed to have been finally and conclusively settled, except where the litigation is a direct proceeding for the purpose of reversing or setting aside such adjudication. (*Markley v. People*, 234.)

11. JUDGMENT—RES JUDICATA—FINALITY OF ADJUDICATION AS TO INVALIDITY OF ORDINANCE—SPECIAL ASSESSMENT.—An order of court refusing a judgment for one installment of a special assessment is conclusive on an application for a judgment for a subsequent installment of the same assessment, on the same piece of property, where such judgment was refused because of the invalidity of the ordinance on which the assessment was based. There is no reason why the same material and essential fact, the validity of the ordinance, should be relitigated each time an installment of the invalid assessment falls due. (*Markley v. People*, 234.)

12. PRACTICE.—AN IRREGULARITY IN CHANCERY PRACTICE committed by consent of parties is not a ground for reversal. (*Thomson v. Kyle*, 193.)

13. JUDGMENTS—EFFECT OF REVERSAL ON PURCHASER.—An execution plaintiff who holds a sheriff's certificate of sale is not a purchaser in good faith in the sense that he is entitled to retain property purchased by him under a judgment subsequently reversed. His title is divested by the reversal, and his grantee, though not a party to the action, nor cognizant of the defect in title, is not a purchaser in good faith, and acquires no greater rights than the judgment plaintiff had. (*Singly v. Warren*, 896.)

See Appeal, 18; Debtor and Creditor, 1-3; Partition, 5, 6; Partnership, 1.

#### JUDICIAL SALES.

1. THE TITLE OF THE PURCHASER OF LAND AT A JUDICIAL SALE, upon confirmation, does not relate back to the date of the sale. (*Pearson v. Gillenwaters*, 844.)

2. JUDICIAL SALES—RIGHT TO RENTS AND PROFITS.—A purchaser of land at a judicial sale is not entitled to the rents and profits for a period between the sale and its confirmation. (*Pearson v. Gillenwaters*, 844.)

3. JUDICIAL SALE, ASSIGNEE OF BID, JURISDICTION OVER.—If a purchaser at a judicial sale assigns his bid, and the assignee accepts the assignment and requests a conveyance to be made to him, he thereby submits himself to the jurisdiction of the court, and may be compelled to make payment by the same proceeding which, but for the assignment, might be prosecuted against the original purchaser. (*Archer v. Archer*, 688.)

**See Appeal, 15, 16; Executions; Insurance, 4; Judgment, 13; Mortgage, 15, 16; Receivers, 8.**

### JURISDICTION.

**THE JURISDICTION OF A COURT OF ANOTHER STATE** in which a judgment has been entered is always open to inquiry in the courts of this state, and if the court has exceeded its jurisdiction, or has not obtained jurisdiction of the parties, the proceedings are void. (*Atherton v. Atherton*, 650.)

### JURY TRIAL.

**See Trial.**

### LACHES.

**See Creditors' Bill, 7.**

### LANDLORD AND TENANT.

**EVIDENCE, PAROL TO SHOW THAT ONE OF THE AP-  
PARENT LESSORS WAS NOT A PARTY TO A LEASE.**—If a landowner and his son join as lessors in a lease of the former's property, the lessees may show by parol evidence that they did not deal with the son as a party in interest, but had him sign for some other purpose, as for instance, as a subscribing witness, or to show that his father, who was old and infirm, had not been imposed upon, or as a result of some mistake as to the necessity of his signing. (*Swint v. McCalmont Oil Co.*, 791.)

**See Mechanics' Lien, 4.**

### LATERAL SUPPORT.

**See Limitations of Actions, 6.**

### LICENSEE.

**See Master and Servant, 1.**

### LIFE TABLES.

**See Estates, 8; Evidence, 1.**

### LIMITATIONS OF ACTIONS.

**1. LIMITATIONS OF ACTIONS—CREATURE OF STATUTE.**—At common law, there was no limitation, as to time, upon the right to bring a personal action. Such limitations are, and always have been, pure creatures of the statute. (*Cowhick v. Shingle*, 17.)

**2. LIMITATIONS OF ACTIONS—DEMURRER.**—If it appears upon the face of a petition that the cause of action accrued at such a period that, under the statute of limitations, no action can be brought, a demurrer, on the ground that it does not state facts sufficient to constitute a cause of action, will be sustained. (*Cowhick v. Shingle*, 17.)

**3. LIMITATIONS OF ACTIONS—REQUIREMENTS AS TO PAYMENT, ACKNOWLEDGMENT, OR PROMISE.**—Neither a payment, an acknowledgment, nor a promise in writing will take a case out of the bar of the statute of limitations, unless made by the party to be charged thereby, or an agent authorized for that express purpose. (*Cowhick v. Shingle*, 17.)

**4. LIMITATIONS OF ACTIONS—PART PAYMENT BY ONE DEBTOR—EFFECT OF.**—A partial payment by one of two parties, jointly and severally liable upon a promissory note, does not suspend

the running of the statute of limitations in favor of the other party. (Cowhick v. Shingle, 17.)

5. **LIMITATIONS OF ACTIONS—ACKNOWLEDGMENT OR PAYMENT BEFORE OR AFTER BAR.**—There is no distinction between the legal effect of an acknowledgment or payment made before or after the bar of the statute of limitations has attached. In either case, the legal effect thereof is to create a new cause of action. (Cowhick v. Shingle, 17.)

6. **LIMITATIONS OF ACTIONS—REMOVAL OF LATERAL SUPPORT.**—The statute of limitations begins to run against a right of action for damages for the removal of lateral support only from the time that injury actually results therefrom, and not from the time of the act of removal. (Smith v. Seattle, 910.)

7. **STATUTE OF LIMITATIONS—TRUSTS.**—One who participates in a breach of a trust can no more than the trustee invoke the defense of the statute of limitations. (Duckett v. Mechanics' Nat. Bank, 513.)

See **Adverse Possession**; **Creditors' Bill**, 6; **Negotiable Instruments**, 8, 9.

### LIVESTOCK.

See **Carriers**, 5-7.

### MARKETABLE TITLE.

See **Vendor and Purchaser**, 1.

### MARRIAGE AND DIVORCE.

1. **MARRIAGE — CEREMONY — CELEBRATION.** — A simple marriage ceremony does not make a man and woman husband and wife. Capacity and consent are absolutely essential, but celebration only contingently so. (Orchardson v. Cofield, 211.)

2. **MARRIAGE AND DIVORCE—PROHIBITED MARRIAGES—CONFLICT OF LAWS.**—Persons domiciled in one state, where marriage between them is absolutely prohibited, cannot evade its laws and policy by going to another state, and there marrying, and then returning to the home state to reside. Such marriage is void in the latter state. (Estate of Stull, 776.)

3. **MARRIAGE AND DIVORCE—PROHIBITED MARRIAGES—CONFLICT OF LAWS.**—If a man and woman, citizens of the same state, and subject to an absolute statutory prohibition against entering into a marriage contract which is against good morals, leave their domicile and enter another state where marriage between them is not prohibited, and there marry for the express purpose of evading the law of their domicile, such marriage is void in the state having the prohibition. (Estate of Stull, 776.)

4. **MARRIAGE AND DIVORCE—PROHIBITED MARRIAGES—CONFLICT OF LAWS.**—If, under a statute providing that a wife or husband who shall have been guilty of adultery, shall not marry the person with whom it was committed during the life of the former husband or wife, a husband, after being divorced from his wife, in the state where such statute is in force on the ground of adultery with a woman domiciled therein, goes into another state and marries his paramour, such marriage being there valid, and they immediately return to their former domicile, the second marriage is void in the state having the prohibition, and the second wife is not entitled to administer upon the husband's estate while the first wife survives. (Estate of Stull, 776.)

5. **MARRIAGE — INVALIDITY — INSANE PERSONS.**—The marriage of an insane person is void, and its invalidity may be



shown in any court, and between any parties, either in the lifetime of the parties thereto or after their death. (*Orchardson v. Cofield*, 211.)

6. **MARRIAGE — INVALIDITY — INSANE PERSONS — EVIDENCE—FRAUD.**—In determining whether a marriage is invalid, because of the wife's mental incapacity at the time of the alleged marriage, the question of fraud is also to be considered with the evidence of mental incapacity where it appears that the marriage in question was brought about and procured by the husband in the accomplishment of his scheme and purpose to obtain possession of his wife's property. (*Orchardson v. Cofield*, 211.)

7. **MARRIAGE — INVALIDITY — INSANE PERSONS — EVIDENCE.**—In determining the mental capacity of an alleged insane person to enter into a contract of marriage, the question is not whether his conduct was wise, but whether his mind could, and did, act rationally regarding the precise thing in contemplation—marriage. (*Orchardson v. Cofield*, 211.)

8. **A DECREE OF DIVORCE GRANTED AGAINST A WIFE** in a state of which she was not a resident at the time of the commencement of the suit, and when she was not served with process in the state, and did not submit herself to the jurisdiction of its courts, cannot prevent her from prosecuting with success, in the courts of this state, a suit against her husband to obtain a divorce from him because of his cruel and inhuman treatment of her. (*Atherton v. Atherton*, 650.)

9. **DIVORCES GRANTED IN ANOTHER STATE.**—A divorce entered in another state against a resident of the state of New York in a suit in which the defendant did not appear, in which process was not served on her within the state wherein the decree was rendered, is void as against her in New York, though the plaintiff was, and always had been, a resident of the state in which he so procured his divorce, and the defendant was also a resident of that state during the time she lived with him as his wife, she having, however, returned to, and become a resident of, New York before the suit for divorce was commenced. (*Atherton v. Atherton*, 650.)

10. **HUSBAND AND WIFE—DOMICILE OF THE WIFE IS NOT NECESSARILY THAT OF THE HUSBAND.**—The matrimonial domicile of the wife is usually that of the husband, but if she is justified in leaving him because his conduct has been such as to entitle her to a divorce, and she thereupon does leave him and go into another state for the purpose of there permanently residing, she acquires a domicile in the latter state. (*Atherton v. Atherton*, 650.)

11. **HUSBAND AND WIFE — AGREEMENT BETWEEN, WHEN SET ASIDE BY SUBSEQUENT PROCEEDINGS.**—An agreement between a husband and wife recognizing the fact that they had ceased to live together, providing for the custody of their child and the amount he is to pay for its and her support, and that divorce, or second marriage of either party is to terminate it, must be regarded as mutually abandoned by the parties when each has prosecuted a suit against the other for divorce; and the court is therefore authorized, in a suit by her against him, to make such decree as may be deemed proper respecting alimony and the custody of the child. (*Atherton v. Atherton*, 650.)

#### MARRIED WOMEN.

See Husband and Wife, 8.

**MASTER AND SERVANT.**

**1. MASTER AND SERVANT—LICENSEE, SERVANT, WHEN BECOMES.**—A servant or employé who leaves that portion of his master's premises where his duties require him to be and goes about his own convenience, becomes a licensee, and the master's responsibility for his safety is no greater than if he were any other licensee. (*Kennedy v. Chase*, 153.)

**2. EMPLOYER AND EMPLOYEE.**—Designs and recipes made by an employé are, as between him and his employer, the property of the latter for the purposes of his business. Though there is a patent issued to the employé for his formula, the right of the employer to continue its use in his business remains. (*Dempsey v. Dobson*, 809.)

**3. MASTER AND SERVANT—KNOWLEDGE OF DANGERS.** A person of mature years taking employment in a service is presumed to assume the hazards thereof, and his master is not liable for a failure to instruct him, unless such master or his foreman knew, or had reason to believe, that the servant was ignorant of, or incapable of comprehending, the dangers of the service. (*Peterson v. Pittsburgh Coal etc. Co.* 289.)

**4. NEGLIGENCE—PLEADING NEGATING KNOWLEDGE ON THE PART OF THE PLAINTIFF.**—If a servant sues his master for injuries claimed to have resulted from the unfitness of a fellow-servant, and from defects in the place where the work was carried on, rendering it unsafe, the complaint must show that the plaintiff was himself without knowledge of the incompetency of the fellow-servant, and of the defects in the place where he worked. (*Peterson v. New Pittsburgh Coal etc. Co.*, 289.)

**5. MASTER AND SERVANT.**—The duty of a master to furnish a safe place in which his servant is to work is limited to the premises where he is required for the purposes of his employment to be. If he goes to other parts of the premises for some object of his own, he assumes the risk arising from their dangerous condition. (*Kennedy v. Chase*, 153.)

**6. MASTER AND SERVANT—INJURY TO A SERVANT BY FALLING THROUGH A HATCHWAY WHERE HIS DUTIES DO NOT REQUIRE HIM TO BE.**—Conceding that an employé has the right to safe ingress and egress to and from the place where he is required to work, and, as incident to his employment, to remove some of his garments and leave them on the premises and to return therefor, yet if he selects a place remote from that where he is at work and is injured by falling through an open hatchway while attempting to get such garments, his master is not liable. In going so far from the place where it was his duty to work, he was no more than a mere licensee at sufferance to whom the master owed no duty. (*Kennedy v. Chase*, 153.)

**7. NEGLIGENCE IN NOT FURNISHING APPLIANCES—PLEADINGS.**—An allegation in a complaint that the place in which a plaintiff was required to work was unsafe, and that a second or additional platform was not constructed around an elevator, is not sufficient, where it does not appear therefrom that it was practicable to maintain an additional platform, nor that the platform in use was not sufficient for all purposes in connection with the elevator. (*Peterson v. New Pittsburgh Coal etc. Co.*, 289.)

**8. MASTER AND SERVANT—INJURY TO ONE SERVANT FROM THE NEGLIGENCE OF ANOTHER.**—A master is not liable to his servant for injuries resulting from the negligence of a fellow-servant, unless the latter was incompetent and unfit for the service, and this was known, or should have been known, to the master. (*Park v. New York Cent. etc. R. R. Co.*, 663.)

9. MASTER AND SERVANT, EVIDENCE TO ESTABLISH THE INCOMPETENCY OF A FELLOW-SERVANT.—Evidence that some eight or ten years prior to the accident in which plaintiff was injured, as he claimed, through the negligence of an incompetent fellow-servant, that such fellow-servant was called "Crazy Brown," is incompetent and prejudicial. (*Park v. New York Cent. etc. R. R. Co.*, 663.)

10. MASTER AND SERVANT—INCOMPETENCY OF FELLOW-SERVANT—GENERAL REPUTATION AS EVIDENCE OF. Where it is claimed that a fellow-servant, through whose negligence the plaintiff received injury, was incompetent and unfit for the duties he undertook to perform, such incompetency and unfitness cannot be proved by evidence of his general reputation. His incompetency must be shown by specific acts of the servant, and it must further appear, to fasten liability on the master, that he knew, or ought to have known, thereof. This knowledge may be shown by evidence tending to establish that such incompetency was generally known in the community. (*Park v. New York Cent. etc. R. R. Co.*, 663.)

See Custom, 2.

### MECHANICS' LIEN.

1. MECHANICS' LIENS—STATUTORY CONSTRUCTION.—A statute authorizing a lien against a building erected by a lessee and his interest under the lease, should not be extended in its operation by implication. It should be construed to embrace only such buildings as the lessee might himself, at common law, remove at any time during his term, before surrendering possession. (*Stenberg v. Liennemann*, 636.)

2. MECHANICS' LIENS—REMEDIAL LAWS—EXTRATERRITORIAL OPERATION.—Remedial laws, such as mechanics' lien laws, do not operate extraterritorially, on account of being applied by the courts of the state in which they are in force, to actions pending in such courts on contracts made and to be performed in another state or country. Remedies must be applied according to the place where the action is instituted, without regard to the place where the right arises. (*Mack v. De Graff etc. Quarries*, 729.)

3. MECHANICS' LIENS—CONFLICT OF LAWS—INTER-STATE CONTRACT.—A subcontractor, who, in another state, contracts, sells, and delivers to a principal contractor materials to be transported by the latter to Ohio, and there used by him in constructing a building or public improvement, is entitled to a mechanics' lien in the latter state under its statute providing that any materialman who furnishes material for the construction of an improvement, by virtue of a contract with the owner, or between any board or officer, and a principal contractor, shall have a lien therefor. (*Mack v. De Graff etc. Quarries*, 729.)

4. MECHANICS' LIENS—LEASED PREMISES.—Mechanic's lien for material and labor furnished at the request of a lessee, who subsequently forfeits his lease, embraces only such improvements as the lessee might have removed during the term, and does not include such improvements or repairs as cannot be removed without injury to the leased premises. (*Stenberg v. Liennemann*, 636.)

5. MECHANIC'S LIEN—CONTRACT AS TO PARTY-WALL.—While an express promise to pay one-half of the value of a party-wall is enforceable against an adjoining owner who uses the wall, the plaintiff is not entitled to a mechanic's lien on the defendant's property for such amount. (*Swift v. Calnan*, 443.)

See Insurance, 12, 21.



## MINES AND MINING.

1. **MINES AND MINING—RIGHT TO DEPOSIT TAILINGS IN STREAM.**—One engaged in mining has the right to deposit his tailings in a running stream to a reasonable extent, but he has no right to flood a lower owner's land, and by depositing tailings and debris thereon to substantially injure or ruin the latter's property, although he has used all reasonable means to prevent such damage. (*Fitzpatrick v. Montgomery*, 622.)

2. **PETROLEUM OIL IS A MINERAL**, and while in the earth is part of the realty, and if it moves from place to place, by percolation or otherwise, it forms part of the tract of land in which it tarries for the time being, and if it then moves to another tract it becomes part of that tract. (*Kelley v. Ohio Oil Co.*, 721.)

3. **PETROLEUM OIL—RIGHT TO.**—An owner may so use his own premises as to secure and appropriate petroleum oil which comes into his land by percolation, or by flowing through unknown natural underground channels. (*Kelley v. Ohio Oil Co.*, 721.)

4. **PETROLEUM OIL, PROPERTY IN.**—Petroleum oil, whether it moves, percolates, or exists in pools or deposits, is the property of the person who reaches it by means of a well, and severs it from the realty and converts it into personalty. (*Kelley v. Ohio Oil Co.*, 721.)

5. **PETROLEUM OIL—WHEN PERSONALTY.**—Petroleum oil forms part of some tract of land, until it reaches a well and is raised to the surface; it then becomes the personal property of the person into whose well it comes and who raises it to the surface. (*Kelley v. Ohio Oil Co.*, 721.)

6. **OIL WELLS—RIGHT TO DRILL.**—The right to drill oil wells and to produce oil on one's own land is absolute, and cannot be enjoined, supervised, or controlled by a court, or an adjoining owner, and so long as such operations are legal their reasonableness cannot be drawn in question. (*Kelley v. Ohio Oil Co.*, 721.)

7. **OIL WELLS—RIGHT TO DRILL.**—An owner or lessee of oil lands has an absolute right to drill an oil well near the division line of his land, so long as all operations are confined to the lands upon which the well is drilled; and whatever gets into such well, either by percolation or by flowing through unknown natural underground channels, belongs to the owner of the well, no matter where it comes from. (*Kelley v. Ohio Oil Co.*, 721.)

See Adverse Possession, 3; Partition, 3, 4.

## MINGLED GRAIN.

See Cotenancy, 1, 2.

## MONOPOLY.

See Contracts, 3, 7; Municipal Corporations, 7-9.

## MORTGAGE.

1. **CONFLICT OF LAW—MORTGAGE EXECUTED BY A WOMAN AS SECURITY FOR HER HUSBAND'S DEBT**, though void in the state where the indebtedness arose, is subject to the laws of the state in which the property is located, in order to ascertain its validity, construction, and the capacity of the parties to execute it, and if the laws of such state permit a woman to execute a mortgage to secure her husband's debt, the mortgage will be enforceable in the courts thereof. (*Thomson v. Kyle*, 193.)

**2. MORTGAGE DEBT, OPTION AND ELECTION TO TREAT AS DUE.**—Where a mortgage provides that in the event of default in the payment of interest, the principal sum shall become due and payable immediately, notice need not be given to the mortgagor of an election to treat the whole amount of the debt as due. The election is sufficiently manifested by commencing a suit to foreclose. (*Hawes v. Detroit Fire etc. Ins. Co.*, 581.)

**3. MORTGAGE—ASSIGNEE'S RIGHTS.**—In a suit by an assignee to foreclose the mortgage assigned to him, the court does not err in sustaining questions asked on cross-examination respecting the amounts paid for the assignment and when the assignee got an absolute title to the notes and mortgage sued upon. (*Woodward v. Brown*, 108.)

**4. MORTGAGE, ASSIGNMENT OF, DEALINGS WITH MORTGAGOR AFTERWARD.**—Payment to, and an agreement with, a mortgagee after his assignment of the mortgage, whether for collateral security or not, cannot prejudice his assignee, who has recorded the assignment, and also has the note in his possession. (*Woodward v. Brown*, 108.)

**5. AFTER MORTGAGOR'S TITLE HAS BEEN DIVESTED,** thenceforward his acts are those of a stranger to the premises, and can neither prejudice nor assist his grantee or successor in interest. (*Peshine v. Ord*, 131.)

**6. MORTGAGE—MORTGAGOR'S RIGHTS WHEN HE HAS SOLD THE PROPERTY.**—Though a mortgagor has sold a part of the premises subject to the mortgage, covenan<sup>ing</sup> in his conveyance that they were free from encumbrances, this does not authorize the mortgagee to release from his mortgage the part so sold and conveyed, and entitle him to a judgment for the mortgage debt without giving the mortgagor credit for the value of the property so released. (*Woodward v. Brown*, 108.)

**7. MORTGAGE.**—The liability of a mortgagor under the laws of California is such that he cannot be compelled to pay any part of the mortgage debt until a decree has been entered for the sale of the premises, and the liability which even then exists against him is only to pay any deficiency which shall arise after a foreclosure sale. The mortgaged premises must be regarded as the principal debtor and the mortgagor as the surety, and his rights as surety should be preserved. (*Woodward v. Brown*, 108.)

**8. MORTGAGE.—A PARTIAL RELEASE** of a mortgage may be made, and, when made, it affects only the property therein described, and such release, whether upon the margin of the record or contained in a separate instrument, duly acknowledged and recorded, is sufficient to put persons dealing with the mortgaged premises upon inquiry. (*Woodward v. Brown*, 108.)

**9. MORTGAGE, RELEASE, CONSTRUCTION OF.**—An instrument purporting to be made in consideration of fifty dollars, and declaring that certain parts of the mortgaged premises, describing them, are released from the lien of the mortgage, "together with the debt thereby secured is fully paid, transferred, and discharged," does not release the whole mortgage debt, but is restricted to the property described. (*Woodward v. Brown*, 108.)

**10. MORTGAGE—MORTGAGOR'S RIGHT TO HAVE THE WHOLE OF THE PROPERTY APPLIED SO AS TO BE RELIEVED FROM PERSONAL LIABILITY.**—The mortgaged premises constitute the primary fund out of which the mortgage debt is to be paid, and the mortgagee cannot arbitrarily release portions of the premises for less than their actual value without the consent of the mortgagor, and, if he does so, he must, on foreclosure,

credit the mortgagor with the value of the premises released. (Woodward v. Brown, 108.)

11. **MORTGAGES—ORAL AGREEMENT TO ASSUME—BURDEN OF PROOF.**—An oral agreement by a grantee to assume and pay a mortgage on the granted premises is enforceable as a contract independent of, and additional to the deed, but the burden of proof is on the party setting up such contract to establish it by a clear preponderance of the evidence which must be clear, satisfactory, and convincing. He is not entitled to recover if the evidence is equally balanced. (Ordway v. Downey, 892.)

12. **FORECLOSURE, PARTIES TO.**—One who has purchased part of the mortgaged premises, and duly recorded his conveyance thereof, must be made a party to a subsequent suit of foreclosure. (Woodward v. Brown, 108.)

13. **A SHERIFF'S DEED** takes effect by relation as of the date of the levy of the attachment upon which it was based, and if the land described therein is one of several parcels subject to a mortgage which is subsequently foreclosed, the rights and duties of the holder of the sheriff's deed must be regarded as if he had received his conveyance at the time of the attachment. (Woodward v. Brown, 108.)

14. **PARTIES.**—A suit to set aside a foreclosure sale for irregularities thereunder is in effect a suit to redeem, to which the wife of the complainant should be made a party. (Hawes v. Detroit Fire etc. Ins. Co., 581.)

15. **JUDICIAL SALES—IRREGULARITIES, REMEDIES FOR.** Where a mortgagor seeks to set aside a foreclosure sale on account of irregularity in selling parcels en masse, he must either offer to make payment of the sum due or to submit to a sale of the premises in proper parcels to satisfy the sums due. (Hawes v. Detroit Fire etc. Ins. Co., 581.)

16. **JUDICIAL SALE MADE EN MASSE.**—Where a mortgage includes several tracts of land, one of which is shown to be platted and laid out in lots for the purpose of selling as such, a sale under foreclosure of the whole property en masse should be vacated. (Hawes v. Detroit Fire etc. Ins. Co., 581.)

17. **MORTGAGE.**—Where parts of the realty subject to a mortgage are sold at different times, the decree in foreclosure should direct the sale of such parts in the inverse order of their alienation. (Woodward v. Brown, 108.)

18. **MORTGAGES—FORECLOSURE BY PIECEMEAL—ASSIGNMENT OF CLAIM FOR TAXES—SPLITTING CAUSES OF ACTION.**—It is not permissible to split causes of action and to foreclose a mortgage by piecemeal. Hence, if a mortgage is foreclosed by a loan and trust company, and the plaintiff does not ask to recover certain taxes paid by it on the property, under the provisions of the mortgage, it cannot so assign the claim for taxes as to vest in the assignee a right to recover them. (Day v. Brenton, 460.)

See Adverse Possession, 4; Assignment for Benefit of Creditors, 2; Covenants; Execution, 4; Insurance, 8; Trusts, 13; Usury, 2.

## MUNICIPAL CORPORATIONS.

1. **PUBLIC CONTRACTS—LOWEST BIDDER, RIGHT OF TO RECOVER FOR REFUSAL TO AWARD HIM THE CONTRACT.** The lowest bidder under a contract proposed to be let by a municipal corporation whose bid is wrongfully rejected cannot, in an action at law, recover the profits which he might have made had such bid been accepted. Statutory requirements requiring contracts to



be let to the lowest bidder are not intended for his protection, but that of the public, and hence he has no remedy to recover damages sustained by their violation. (*Talbot Paving Co. v. City of Detroit*, 604.)

2. **CONTRACTS, OBLIGATION OF.**—Where a loan is made to a city upon its general security, and without any pledge of its revenues, from gasworks or other specified source, the fact that the trustees of the gasworks are required to pay a certain per centum of the loan annually, to be put into the city treasury, which the city undertakes to apply to the payment of the interest on the loan, and to the creation of a sinking fund, does not entitle a bondholder to enjoin a lease of its gasworks by such city. These provisions respecting this per centum, and its retention and payment into the city treasury, do not constitute any part of the contract between the municipality and the bondholder. (*Baily v. Philadelphia*, 812.)

3. **MUNICIPAL CORPORATIONS—APPROPRIATIONS BY—CONSTITUTIONAL LAW.**—Under a constitutional provision forbidding a municipality "to appropriate money or loan its credit to any corporation, association, institution, or individual," a city has the right to appropriate money to a committee of citizens appointed by a chamber of commerce and ratified by the city authorities to defray the expenses of a survey for a ship canal, and for securing information as to the practicability and benefit to be derived by the city from such canal. (*Commonwealth v. Pittsburg*, 752.)

4. **A MUNICIPAL CORPORATION** in supplying its citizens with light in the streets and public places, acts under authority merely, and not under municipal obligation. Hence, a city may change its mode of action or cease to act, and the courts have no power to interfere, unless the proposed action contravenes some express statute or violates some binding contract. (*Baily v. Philadelphia*, 812.)

5. **A MUNICIPAL CORPORATION** may lease gasworks owned by it, and which it has operated for the purpose of supplying its citizens and streets and other public places with light. Its power to make such a lease is not impaired by a statute creating a department of public works in cities of the class in question, and declaring that gasworks owned and controlled by a city and the supply and distribution of gas shall be under the control of such department. (*Baily v. Philadelphia*, 812.)

6. **MUNICIPAL CORPORATIONS.**—Gasworks when owned by a city are held by it as a business corporation, and it may hence lease them to another corporation and give the latter the right to operate them for a period of years, and may stipulate to do nothing by ordinance or otherwise during that period to interfere with, limit, restrict, or impair the rights of the lessee. (*Baily v. Philadelphia*, 812.)

7. **MUNICIPAL CORPORATIONS—ORDINANCES CREATING A MONOPOLY, OR PREVENTING COMPETITION—INVALIDITY OF.**—An ordinance creating a monopoly, or preventing competition, is void. Thus, an ordinance making the use of an article or substance controlled by a single person or corporation indispensable in the construction of a public work, must necessarily create a monopoly in favor of such person or corporation, and also limit the persons bidding to those who may be able to make the most advantageous terms with the favored person or corporation. (*Fishburn v. City of Chicago*, 236.)

8. **MUNICIPAL CORPORATIONS—ORDINANCES TO AVOID CREATING A MONOPOLY OR PREVENTING COMPETITION—PROPER FORM OF.**—It is not necessary to foster and create a monopoly, and prevent competition in the letting of public contracts

by providing in ordinances that a certain substance or article, and no other, shall be used for a public improvement. If some particular material, controlled by a single person or corporation, is desired, the ordinance should be so framed as to make that material the standard of quality and fitness, and to require that material equal to it, in all respects, must be employed. (*Fishburn v. City of Chicago*, 236.)

9. MUNICIPAL CORPORATIONS—ORDINANCES CREATING A MONOPOLY, OR PREVENTING COMPETITION—INVALIDITY OF—PAVING STREETS.—If a contract to pave a street is required, by law, to be let to the lowest responsible bidder, an ordinance requiring the paving cement to be prepared from asphaltum "obtained from Pitch lake, in the island of Trinidad," tends to create a monopoly, and to prevent competition, where it is shown that such lake is owned by a single corporation, and that the asphaltum obtained from it is no better than that obtained elsewhere and used by competing cement manufacturers. It is, therefore, void, and such evidence is admissible to show its invalidity, though it does not appear from the face of the ordinance that its effect is to create a monopoly or to prevent competition. (*Fishburn v. City of Chicago*, 236.)

10. TAXATION—EXEMPTION BY CITY.—No city or town has power by contract, or otherwise, to exempt property from taxation. (*City of Tampa v. Kaunitz*, 202.)

11. DAMAGES. EXEMPLARY — MUNICIPAL CORPORATIONS.—Exemplary damages cannot be awarded against a municipal corporation, unless expressly authorized by statute. (*Bennett v. City of Marion*, 454.)

See Constitutions, 2; Judgment, 11.

## NEGLIGENCE.

1. NEGLIGENCE.—There can be no negligence without the existence of a corresponding duty. (*Kennedy v. Chase*, 153.)

2. NEGLIGENCE WILL NOT BE PRESUMED from the mere happening of an accident and a consequent injury, except when contractual relations exist between the parties, as in the case of carriers of passengers and some others. Plaintiff must, to sustain a recovery, prove either actual negligence or conditions which are so obviously dangerous as to admit of no inference other than that of negligence. (*Stearns v. Ontario Spinning Co.*, 807.)

3. NEGLIGENCE—BUILDING. LIABILITY OF OWNER FOR THE FALLING OF A DANGEROUS IMPLEMENT ON PERSON BENEATH.—If an axe falls from the fifth story of a building striking and killing a person lawfully in the area outside it, and there is no proof of negligence on the part of the owner of the building, and the evidence of the person using the axe when it fell shows due care on his part, a nonsuit is properly entered in an action against the owner to recover for the damages thus inflicted. (*Stearns v. Ontario Spinning Co.*, 807.)

4. NEGLIGENCE—DAMAGE FROM—ONUS OF PROVING.—Where a plaintiff relies upon the negligence of the defendant as producing an injury, and it is apparent that if such negligence existed and inflicted injury, injury was also suffered through the negligence of the plaintiff himself, it is incumbent on him to prove what injury or damage, if any, was due to the negligent act of the defendant of which complaint is made. (*Heller v. Chicago etc. Ry. Co.*, 541.)

5. JURY TRIAL—INSTRUCTIONS.—Where a complaint contains several grounds of negligence, it is the duty of the court to instruct the jury as to those upon which alone a recovery may be

based, and to eliminate all others. (*Heller v. Chicago etc. Ry. Co.*, 541.)

See Banks and Banking, 6; Carriers, 1, 2; Damages, 1; Master and Servant, 7, 8; Railroad Companies, 2, 3.

### NEGOTIABLE INSTRUMENTS.

1. **PROMISSORY NOTE—WHEN A JOINT OBLIGATION.**—A note signed by two or more parties wherein the promising phrase is, "we promise," is prima facie evidence of a joint obligation, and such a note as an exhibit is sufficient to support an allegation of a joint promise. (*Taylor v. Reger*, 352.)

2. **NEGOTIABLE INSTRUMENTS — ASSIGNMENT.**—One who acquires a note by assignment acquires no better title than had the payee. (*Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 628.)

3. **NEGOTIABLE INSTRUMENTS — BONA FIDE PURCHASER, WHO IS.**—One who purchases a negotiable instrument before maturity, paying therefor by surrendering notes and securities held by him against third persons, is a bona fide holder for value and entitled to protection as such. (*Bank v. Looney*, 830.)

4. **A NEGOTIABLE INSTRUMENT IS NOT SATISFIED,** nor the liability of the maker or his indorser waived or extinguished, by an agreement between the holder and the second indorser by which he was released from liability on his indorsement, certain sureties being substituted in place of such liability. (*Bank v. Looney*, 830.)

5. **NEGOTIABLE INSTRUMENTS — ACCOMMODATION INDORSER.**—An indorser is not relieved from liability by the fact that the purchaser or indorser of the note had knowledge that such indorser had no interest in the transaction. (*Bank v. Looney*, 830.)

6. **PROMISSORY NOTES, OPTION TO DECLARE DUE.**—The commencement of an action upon a promissory note is a sufficient exercise of the holder's option to declare it due for the non-payment of interest. (*Woodward v. Brown*, 108.)

7. **NEGOTIABLE INSTRUMENTS — SUBSTITUTION OF NOTE AS DEFENSE.**—The maker of a note is not released from liability thereon by an agreement, made after its maturity, between the payee and a third person for the substitution of the latter's note for it, when such agreement is without consideration and remains unexecuted. (*Shuey v. Adair*, 879.)

8. **NEGOTIABLE INSTRUMENTS—DEMAND OF PAYMENT —STATUTE OF LIMITATIONS.**—The holder of a note due on demand must demand payment within a reasonable time, and before the right of action thereon is barred by limitation. (*Oleson v. Wilson*, 639.)

9. **NEGOTIABLE INSTRUMENTS—JOINT MAKERS—STATUTE OF LIMITATIONS.**—One joint maker of a note by a partial payment thereof, after its maturity, without the assent or ratification of his comakers, binds only himself, so far as an extension of the statutory period of limitations is concerned. (*Oleson v. Wilson*, 639.)

10. **PLEADING.**—If, in an action against a corporation, the complaint alleges that a note sued upon was executed by the defendant, while the answer denies that defendant executed the note, or that he authorized the person who signed his name thereto, the ultimate fact, the execution of the note by defendant, is properly alleged in the complaint; and the allegation, in the answer as to the agency is new matter requiring no denial by replication. (*Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 628.)



**11. PRACTICE—FINDINGS, WHEN SUFFICIENT.**—An issue as to whether the plaintiff is the real party in interest is sufficiently met by a finding that he is the owner and holder of the note sued upon. (*Woodward v. Brown*, 108.)

**12. NEGOTIABLE INSTRUMENTS—PLEADING.**—The plea of a maker of a note that its execution is without consideration is insufficient, when such defense can only be established by parol evidence showing that such maker executed the note as agent. (*Schuey v. Adair*, 879.)

See Agency, 2-5; Corporations, 5; Evidence, 5; Trusts, 2-4.

## NEW TRIAL.

See Trial, 13.

## NOTICE.

**NOTICE, REGISTRATION OF CONVEYANCE AS.**—The registration of a conveyance or encumbrance is constructive notice only to subsequent purchasers and encumbrancers. One holding a mortgage on real property is not affected by subsequently recorded conveyances of parts thereof of which he had no actual notice. (*Woodward v. Brown*, 108.)

See Banks and Banking, 17, 18.

## NUISANCE.

**1. NUISANCE—LAWFUL BUSINESS—CARE AND SKILL.**—If a lawful business is so carried on as to constitute a nuisance, the right of the person injured thereby to recover cannot be defeated by proving that the defendant used care and skill and employed the most approved appliances in the management of his works. (*Susquehanna Fertilizer Co. v. Spangler*, 533.)

**2. NUISANCE—LOCALITY IN WHICH BUSINESS IS CONDUCTED.**—If the operation of a factory interferes with the reasonable and comfortable enjoyment by the plaintiffs of the property, or occasions material injury thereto, they are entitled to relief irrespective of the locality of their property. The fact that the neighborhood is one in which factories are situated and in which other nuisances abound, does not entitle the defendant to exemption from liability, if the plaintiffs have suffered by the interference of the defendant's works with the reasonable and comfortable enjoyment of their property. (*Susquehanna Fertilizer Co. v. Spangler*, 533.)

**3. NUISANCE—WHAT PROPERTY OWNER MUST SUBMIT TO IN BUSINESS OR MANUFACTURING DISTRICT.**—If a man lives in a town where necessary trades are carried on in his neighborhood, he has no ground for complaint if they are carried on in a careful and reasonable manner, though somewhat to his discomfort, but he is not bound to submit to all discomforts and annoyances which may arise even from a useful and lawful business conducted with skill and approved appliances. He cannot be required to submit to smoke, smells, noise, vapors, water, or any gas or fluid to such an extent as to interfere with the ordinary comforts of human existence, or the immediate result of which is sensible injury to the value of his property. (*Susquehanna Fertilizer Co. v. Spangler*, 533.)

## OFFICERS.

**1. AN OFFICE IS a public charge or employment.** The duties of the employment must be continuing, and prescribed by law, and not by contract. Emolument, though a usual, is not a necessary element of an office. (*State v. Hocker*, 174.)

**2. OFFICERS—PUBLIC OFFICE, WHAT IS.**—A public office, such only as may properly come within the legitimate scope of a proceeding in quo warranto, is a public position to which a portion of the sovereignty of the state, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public. (State v. Jennings, 723.)

**3. OFFICERS—PUBLIC OFFICER, FIREMAN IS NOT.**—An ordinary fireman, employed as such by a city, with no control over the fire department, nor any of its property, except to use it in the extinguishment of fires, and who is subject at all times to the direction and control of the chief of the fire department, and paid a monthly salary, subject to discharge at any time by the city council, is an employé and not a public officer, and cannot be ousted from his employment by a proceeding in quo warranto. (State v. Jennings, 723.)

**4. PUBLIC OFFICERS, DEPUTY POSTMASTER, WHO IS A.** The term "deputy postmaster" as used in that part of the constitution declaring that no person holding a lucrative office under the United States shall be eligible to a seat in the general assembly, provided that the office of deputy postmaster shall not be deemed lucrative where the compensation does not exceed ninety dollars per annum, includes all local postmasters. (Bishop v. State, 279.)

**5. OFFICERS—PUBLIC, WHO ARE.—MEMBERS OF A STATE BOARD OF LEGAL EXAMINERS,** required to be appointed by the supreme court of the state, and whose tenure of office is fixed by a statute which also imposes on them the duty of examining all applicants for admission to the bar of the state respecting their intellectual, moral, and professional qualifications and of granting to such applicants certificates of admission to such bar, are public officers. (State v. Hocker, 174.)

**6. OFFICER DE FACTO, WHO IS NOT.**—A person employed by a city council to aid an assessor in making an assessment, is not an officer de facto, but merely an employé, and an assessment made by such assistant is void. (City of Tampa v. Kaunitz, 202.)

**7. OFFICERS.—OFFICE CREATED BY ORDINANCE** may be abolished by repeal of the ordinance, and the incumbent thereupon ceases to be an officer. (State v. Jennings, 723.)

**8. OFFICE—APPOINTMENT TO—WHO MAY EXERCISE POWER OF.**—Under a constitution authorizing the legislature to provide for officers to be elected by the people or appointed by the governor, a statute purporting to authorize the appointment by the supreme court of a state board to examine and grant certificates to applicants for admission to the bar of the state, is unconstitutional and void. (State v. Hocker, 174.)

**9. PUBLIC OFFICE, VACATING ONE BY ACCEPTING ANOTHER.**—Where two public offices are incompatible, the acceptance of a second ipso facto terminates the right to the first. (Bishop v. State, 279.)

**10. PUBLIC OFFICE, ACCEPTANCE OF A SECOND, WHEN IRREVOCABLE.**—When an officer holding a public office accepts, and has been inducted into, a second office incompatible with the first, his title to the first terminates, and cannot be revived by his subsequent resignation of the second. After the first office becomes vacant, the former incumbent cannot be restored to it by his own act. The same rule applies whether the offices are incompatible or not, if the constitution forbids the same person to hold both at the same time. (Bishop v. State, 279.)

**11. PUBLIC OFFICE. SAME PERSON HOLDING UNDER THE STATE AND NATIONAL GOVERNMENTS.**—If a state con-



stitution declares that no person shall hold more than one lucrative office at the same time, a person holding a state office, who subsequently accepts office under the United States, thereby terminates his right to hold the state office, and may be ousted upon information in the name of the state. (*Bishop v. State*, 279.)

12. OFFICERS—RIGHT TO EXTRA COMPENSATION.—An officer whose fees are regulated by statute, can charge fees for those services only to which compensation is by law affixed, and if a service for the benefit of the public is required, and no provision for payment therefor is made, it must be regarded as gratuitous, and no claim for compensation can be enforced. (*Jones v. Commissioners of Lucas Co.*, 710.)

13. OFFICERS—RIGHT TO EXTRA COMPENSATION.—When a duty is enjoined upon a public officer, and no compensation therefor is provided by statute, the presumption is that the service is intended to be gratuitous, or that compensation is to be regarded as covered by fees in other matters, or by salary, or by both. (*Jones v. Commissioners of Lucas Co.*, 710.)

14. OFFICERS—EXTRA COMPENSATION.—A county officer is not entitled to compensation in addition to his salary for making a report for county commissioners of their financial transactions required by statute, or for other services not enumerated in statutes providing for extra compensation. Such services must be deemed to be gratuitous, or to have been done in consideration of the salary attached to the office. (*Jones v. Commissioners of Lucas Co.*, 710.)

15. OFFICERS—CUSTODY OF PUBLIC FUNDS.—STATE AND COUNTY TREASURERS are simply custodians of public funds coming into their hands by virtue of their office, and such funds remain, at all times, public moneys while in their official possession or in the hands of their depositaries. (*State v. Foster*, 47.)

16. OFFICERS—OFFICIAL BONDS—MISAPPLICATION OF FUNDS AFTER SURETY'S DEATH—LIABILITY OF HIS ESTATE.—The estate of a deceased surety upon an official bond is liable for any misapplication of funds, by the officer, occurring after the surety's death. (*Snyder v. State*, 60.)

17. OFFICERS—OFFICIAL BONDS—MISAPPLICATION OF FUNDS AFTER SURETY'S DEATH—LIABILITY OF HIS ESTATE.—If a testator signs an official bond as surety, his estate, after his decease, is liable for a misapplication of funds by the officer, although it is made after a sole executrix and legatee has given a bond to pay the debts of the testator. (*Snyder v. State*, 60.)

18. OFFICERS—OFFICIAL BONDS—CHANGE OF LAW—RELEASE OF SURETIES.—A change in the law, after an official bond is given, providing for a different kind of a bond, does not release the sureties on the former bond for any misapplication of funds occurring after such change, if the subject matter of the action is not affected by the change. (*Snyder v. State*, 60.)

19. OFFICERS — INCREASING RESPONSIBILITIES BY CHANGE OF LAW—RELEASE OF SURETIES.—Increasing the responsibilities of a public officer, in matters properly pertaining to his office, does not have the effect of discharging the sureties on his bond from liability. Hence, if the fees of his office, at the time he is elected, are his compensation, a subsequent law requiring him to account for them does not release the sureties on his official bond from liability for the officer's failure to account for money deposited with him in his official capacity. (*Snyder v. State*, 60.)



**20. OFFICERS—BREACH OF BOND—LIABILITY OF SURETIES.**—The drawing of money from the county treasury by a county officer upon his own official warrant, based upon an illegal and unauthorized allowance by a board of county commissioners of his claim for fees and extra compensation, is a breach of his official bond, and renders his sureties liable to the county for the amount so drawn. (*Jones v. Commissioners of Lucas Co.*, 710.)

See Counties; Judgment, 8; Quo Warranto, 1.

#### OIL WELLS.

See Mines and Mining, 6, 7.

#### OPTION.

See Mortgage, 2; Negotiable Instruments, 6.

#### PARTITION.

**1. PARTITION BY PAROL** made between cotenants is valid and conclusive whether made horizontally or vertically. (*Byers v. Byers*, 765.)

**2. PARTITION BY PAROL—PART PERFORMANCE.**—The execution of a parol partition requires such acts of the parties upon the land as show a part performance of the agreement sufficient to bring it within the equity of enforcement. (*Byers v. Byers*, 765.)

**3. PARTITION BY PAROL—PRESUMPTION.**—A parol partition of coal lands between cotenants raises the presumption that such partition included the whole estate, both the surface and the coal, and the subsequent occasional taking of coal, even if only permissive, by a cotenant, who claims that such partition extended only to the surface, does not prevent the partition from being executed in a legal sense, including the coal as well as the surface of the estate. The burden of proof is still upon him to prove his claim. (*Byers v. Byers*, 765.)

**4. PARTITION BY PAROL—BURDEN OF PROOF.**—If cotenants have made a parol partition of coal lands and one of them afterward claims that such partition includes both the surface and the coal, while the other claims that it includes only the surface of the land, the presumption is that such partition includes both the surface and the coal, and the burden of proof is upon the latter to show to the contrary. (*Byers v. Byers*, 765.)

**5. A JUDGMENT IN PARTITION** does not ordinarily settle questions of title, unless they have directly been put in issue by the pleadings, nor create a new title, nor affect after-acquired titles, but simply divides the premises into separate shares under the titles existing at the time of the partition. Such judgment is, however, as conclusive between the parties upon all the material issues in the cause which the court was called upon to examine, and which under the pleadings were tried and determined, as are judgments in other actions. (*Finley v. Cathcart*, 292.)

**6. PARTITION, JUDGMENT IN, EFFECT OF BETWEEN THE DEFENDANTS, WHEN ENTERED UPON DEFAULT.**—If a complaint in partition correctly states the title of the plaintiff and avers, as to the balance of the title, that it belongs to certain defendants, naming the shares of each, and the failing to answer, partition is made according to the allegations of the complaint, it is not conclusive as between the defendants. Either of them remains at liberty to prove, in a subsequent litigation, that before the commencement of the former action, he acquired the title of another defendant, though, by the judgment in partition, such in-

terest was assigned to the latter to hold in severalty. There being no issues as between the defendants, any judgment which the court pronounced purporting to settle any title or claim between them was, to that extent, coram non judice, and therefore void. (*Finley v. Cathcart*, 292.)

### PARTNERSHIP.

**1. PARTNERSHIP.—A JUDGMENT AGAINST A RETIRING PARTNER BECOMES A LIEN ONLY** on his interest in the firm. If it is insolvent, that interest is nothing at all. (*Adams v. Albert*, 675.)

**2. PARTNERSHIP.—WHEN A RETIRING PARTNER PERMITS HIS PROPERTY TO BE HELD OUT** as the property of the firm, and as forming a part of the foundation on which its credit rests, he cannot subsequently successfully resist its application to the firm debts when necessary to their satisfaction. Nor can he assert, as against the creditors of the firm, a claim in his favor founded upon its liability for the property so left in its possession, and which he has permitted to be held out as firm assets. (*Adams v. Albert*, 675.)

**3. PARTNERSHIP—PARTNER RETIRING AND LEAVING HIS INTEREST IN THE BUSINESS.**—When a retiring partner permits an unliquidated interest to be continued in the business of the firm, such interest becomes liable for the partnership debts subsequently incurred, as well as for prior debts. It may be that the newly acquired assets which, in the course of business, take the place of the old, are subject to the lien of a new debt in preference to the old, and that the old debts remaining in specie are subject to the old in preference to the new debts, but, with this qualification, the rule seems to be well settled in equity, and this is but another way of saying that the interest of the retiring partner still remains at the risk of the business. (*Adams v. Albert*, 675.)

**4. PARTNERSHIP—WHAT DISPOSITION OF PROPERTY OF IS A FRAUD ON FIRM CREDITORS.**—Every act of partners which is destructive of the right of the firm creditors to have the partnership assets applied to the satisfaction of their demands, and which, as a result, hinders, delays, and interferes with the assertion of this right, is, by operation of law, a fraud upon them if the partnership is insolvent. (*Franklin Sugar etc. Co. v. Henderson*, 524.)

**5. PARTNERSHIP — TRANSFERS IN FRAUD OF CREDITORS OF.**—The conversion of the property of a partnership into separate property of its members, or of some of them, when it is insolvent, is a fraud upon the firm creditors. (*Franklin Sugar etc. Co. v. Henderson*, 524.)

**6. PARTNERSHIP—TRANSFER BY ONE PARTNER TO THE OTHERS—WHEN A FRAUD UPON CREDITORS.**—The transfer by one member of an insolvent partnership to the others of his interest in the firm must be treated as a fraud upon the firm creditors, because, if permitted to operate against them, it deprives them of the right to have the firm property applied to the satisfaction of its liabilities. (*Franklin Sugar etc. Co. v. Henderson*, 524.)

**7. INSOLVENCY—INFERENCE OF PRIOR FROM SUBSEQUENT.**—If a partner transfers all his interest in a firm to his co-partners, and ten days later, without any loss being shown during that time, and without any new cause other than the demand of some of the old firm creditors for the payment of their debts, the new firm collapses and is found insolvent, the presumption arises that the in-

**solvency on the part of the old firm existed at the time the member withdrew. (Franklin Sugar etc. Co. v. Henderson, 524.)**

**See Assignment for Benefit of Creditors, 5; Corporations, 11.**

### PARTY-WALLS.

**1. PARTY-WALLS—SPECIAL AGREEMENT AS TO, NOT IN WRITING—WHEN VALID.**—If one of the owners of adjoining and contiguous lots, fronting upon the same street, builds a party-wall on the line between the two lots, upon the other owner's express oral promise and agreement to pay one-half the value thereof upon its use by him, the former may, without reference to the party-wall statute requiring special agreements about such walls to be in writing, recover upon the promise, as at common law, when the latter uses the wall. (Swift v. Calnan, 443.)

**2. PARTY-WALLS — PAROL CONTRACT CONCERNING — VALIDITY OF.**—If a contract is the same, in fact, as that which the law makes for the parties, it is not void. Hence, if a contract as to a party-wall is not different from that which the law makes, it is not void because it is in parol, although the party-wall statute requires special agreements about such walls to be in writing. (Swift v. Calnan, 443.)

**3. PARTY-WALLS—STATUTE—CONSTITUTIONALITY OF—TAKING OF PRIVATE PROPERTY.**—The validity of a party-wall statute which gives a lot-owner the right to build a wall not more than eighteen inches wide, one-half upon the land of his neighbor, and to recover from the latter one-half the expense thereof when he shall use the wall, is not free from doubt, but, as it is not plainly unconstitutional, in contravening provisions with reference to private property, it will be upheld as a valid exercise of the police power, and as resting on the principle that equality is equity. (Swift v. Calnan, 443.)

**4. PARTY-WALLS—STATUTE—CONSTITUTIONALITY OF—LONG-CONTINUED ACQUIESCENCE.**—A party-wall statute giving a lot-owner the right to build a wall more than eighteen inches wide, one-half upon the land of his neighbor, and to recover from the latter one-half the expense thereof when he shall use the wall does not so plainly violate a constitutional provision prohibiting private property to be taken for private use without compensation, that it can be held invalid where it has been generally accepted and recognized as valid and enforceable for more than forty years. (Swift v. Calnan, 443.)

**See Mechanics' Lien, 5.**

### PATENTS.

**See Master and Servant, 2.**

### PERPETUITIES.

**See Definitions, 2; Devise, 14.**

### PETROLEUM OIL.

**See Mines and Mining.**

### PHYSICIANS AND SURGEONS.

**1. A PHYSICIAN AND SURGEON BY TAKING CHARGE OF A CASE IMPLIEDLY REPRESENTS** that he possesses, and the law places upon him the duty of possessing and exercising, that reasonable degree of learning and skill ordinarily possessed by



physicians and surgeons in the locality where he practices, and which is ordinarily regarded as necessary to qualify him to engage in the business of practicing medicine and surgery. (*Pike v. Honsinger*, 655.)

2. A PHYSICIAN OR SURGEON DOES NOT GUARANTEE that his treatment of a patient shall produce a good result, but does guarantee that he will use the skill and learning of the average physician or surgeon, and will exercise reasonable care, and give his best judgment, in an effort to bring about a good result. (*Pike v. Honsinger*, 655.)

3. PHYSICIAN AND SURGEON, DUTY OF, TO WHAT EXTENDS.—The duty of a surgeon, and his liability for not exercising reasonable care, extend not only to diagnosis and treatment, but also to giving all proper instructions to his patient in relation to conduct, exercise, and the use of an injured limb, in the event of his being called to treat an injury of that character. (*Pike v. Honsinger*, 655.)

4. A PHYSICIAN AND SURGEON IS NOT REQUIRED TO POSSESS THAT EXTRAORDINARY LEARNING AND SKILL which belong only to a few men of rare attainments, but such as is possessed by the average member of the medical profession in good standing. He is, however, required to keep abreast of the times, and his departure from approved methods in general use, if it injures his patient, renders him liable, however good his intentions may have been. (*Pike v. Honsinger*, 655.)

5. PHYSICIANS AND SURGEONS—ERRORS OF JUDGMENT, LIABILITY FOR.—The rule requiring a physician and surgeon to use his best judgment does not hold him answerable for a mere error of judgment, provided he does what he thinks best after a careful examination. (*Pike v. Honsinger*, 655.)

6. A PHYSICIAN AND SURGEON IS LIABLE TO HIS PATIENTS for any injury resulting from want of the knowledge and skill ordinarily possessed by persons of his profession in the locality, and for a failure to use his best judgment or to exercise reasonable care. (*Pike v. Honsinger*, 655.)

See Trial, 12; Wills, 14.

#### PLEADING.

1. PLEADING—DEMURRER—ADMISSION OF FACTS.—An allegation in a pleading that a devise was intended to be in lieu of dower is a mere conclusion, and nothing is admitted by a demurrer where no facts are stated to sustain such conclusion. (*Sutherland v. Sutherland*, 477.)

2. PRACTICE—ERROR—JUDGMENT ON DEMURRER.—Where a statute requires proof of allegations, judgment on demurrer without proof is erroneous. (*City of Tampa v. Kaunitz*, 202.)

3. PRACTICE—AMENDED PLEADING—WHEN NEED NOT BE SERVED ON PARTIES IN DEFAULT.—If, after some of the defendants have been in default, the plaintiff amends his complaint merely to the extent of setting out the indorsements on the notes sued upon, showing payments thereon, this is not an amendment in matter of substance, and therefore the amended complaint need not be served on the parties whose defaults had been previously entered. (*Woodward v. Brown*, 108.)

4. PLEADING—REFERENCE TO COURT FILES.—For the purpose of abbreviating the record, portions of the court files may, by specific averment, be referred to, and incorporated in, the pleadings; and this practice is unobjectionable where no confusion or other harm results. (*Sutherland v. Sutherland*, 477.)

**5. PRACTICE.**—If, in a civil action, the facts are admitted or undisputed, the only questions for decision are those of law. (*Helena Nat. Bank v. Rocky Mountain Tel. Co.*, 628.)

**6. COMPLAINT—ACTION FOR DEBT—SUFFICIENCY.**—An averment of the delivery of a certain amount of wheat of a certain value by plaintiff to defendant is not a sufficient averment to sustain an action for debt. (*Drudge v. Leiter*, 359.)

See Negotiable Instruments, 10.

### PLEDGE.

**1. PLEDGES.**—To constitute a valid pledge there must be an actual or symbolical delivery of possession of the thing pledged, and to preserve the pledge the pledgee must retain that possession. If the property is in the possession of a warehouseman who has given a warehouse receipt therefor, the indorsement and delivery of that receipt is equivalent to the delivery of the property described therein. (*Franklin Nat. Bank v. Whitehead*, 302.)

**2. PLEDGE, DELIVERY NOT SUFFICIENT TO SUPPORT.** The setting apart of property for the benefit of a pledgee is not a sufficient delivery to support the pledge, where he had no knowledge of such setting apart, and never took possession of the property. (*Franklin Nat. Bank v. Whitehead*, 302.)

See Chattel Mortgage; Powers, 2.

### POWERS.

**1. POWERS OF ATTORNEY—CONSTRUCTION OF.**—The words "sell and convey," when employed in a power of attorney, do not include authority to mortgage or otherwise dispose of the property than by a sale and conveyance. (*Hawxhurst v. Rathgeb*, 142.)

**2. POWER OF ATTORNEY—WHEN DOES NOT AUTHORIZE A PLEDGE.**—A power of attorney authorizing the sale, transfer, or release of certain mortgages and the indorsement and transfer of notes secured thereby, and the receiving payment of such notes and the giving of acquittances therefor, does not authorize the borrowing of money or the pledging of the notes or mortgages for any purpose. (*Hawxhurst v. Rathgeb*, 142.)

See Judgment, 3, 4.

### PREFERENCE OF CREDITORS.

See Corporations, 7, 8; Debtor and Creditor, 1, 2.

### PRESCRIPTION.

See Adverse Possession, 4.

### PRESUMPTIONS.

See Devise, 5; Judgment, 6; Negligence, 2; Partition, 3.

### PROCESS.

**1. SUMMONS—SIGNATURE OF CLERK.**—A statute providing that summons must be "signed by the clerk and issued under the seal of the court" is mandatory, and to render a summons valid, it must be signed by the clerk. His signature is a matter of substance and a fundamental part of the summons. (*Sharman v. Huot*, 645.)

**2. WRITS—AMENDMENT OF.**—A void jurisdictional writ or process cannot be amended. (*Sharman v. Huot*, 645.)

**3. PRACTICE.**—In an affidavit for the service of summons it is not necessary to state that the sheriff has returned the summons. It is sufficient that the affidavit gives the names of the defendants and the names of the states in which each resides, and refers to the verified complaint and makes it a part of the affidavit. (*Woodward v. Brown*, 108.)

**4. PRACTICE—AFFIDAVIT OF THE PUBLICATION OF SUMMONS, WHO MAY MAKE.**—An affidavit of the publication of summons sworn to by the publisher and proprietor of a newspaper satisfies the statute requiring it to be sworn to by the printer or his foreman or principal clerk. (*Woodward v. Brown*, 108.)

**5. PRACTICE.**—An affidavit of the publication of summons, stating that the paper designated therein is a daily and weekly newspaper, that the summons has been published weekly in such newspaper, commencing on the seventeenth day of March and ending on the twenty-sixth day of July in each and every weekly issue of such newspaper published during such period of time, being the weekly issues thereof, sufficiently shows that the summons was published in the weekly editions of the paper consecutively for the period of more than two months. (*Woodward v. Brown*, 108.)

See Corporations, 14; Executors and Administrators, 4, 5; Marriage and Divorce, 8.

## PUBLIC CONTRACTS.

See Municipal Corporations, 1.

## QUO WARRANTO.

**1. OFFICERS—QUO WARRANTO.**—It is only the incumbent of a public office whose rights can be challenged in a proceeding in quo warranto. (*State v. Jennings*, 723.)

**2. QUO WARRANTO—PLEADING MUST NEGATIVE AN EXCEPTION.**—In a proceeding to oust an officer under the state on the ground that he holds a lucrative office under the United States, if the constitution provides that such office shall not be deemed lucrative unless the salary exceeds ninety dollars per year, the information must show that the office in question does not come within the exception. (*Bishop v. State*, 279.)

See Offices, 2.

## RAILROAD COMPANIES.

**1. RAILROADS—CONSTRUCTION OF STATUTE—EFFECT OF SCHEDULED RATES FIXED BY COMMISSIONERS.**—The schedule of rates fixed by the railroad commissioners under the Iowa statute, which provides that such schedules shall, in all suits brought against railroad corporations in that state, and which, involve the reasonableness of transportation charges on freight, be deemed, in all courts of the state, as prima facie evidence that the rates therein fixed are reasonable and just maximum rates, is not conclusive as to either shipper or carrier, concerning the question involved, but is merely prima facie evidence that such rates are reasonable. Hence, a shipper may recover triple damages, authorized by the statute, as for an overcharge, where the charges are, in fact, unreasonable, although the rates charged are no more than those fixed by the commissioners' schedule. (*Barris v. Chicago etc. Ry. Co.*, 449.)

**2. STREET RAILWAYS—LIABILITY FOR INJURING.**—A motorman in charge of an electric street railway car is not guilty



of negligence in not stopping it when children are running across the track, if their position is such that they can safely cross, unless one of them falls or meets with some other unexpected accident. In the case of one of them falling, it is not until such fall that it becomes the duty of the motorman to stop the car. (*Stabenau v. Atlantic Ave. R. R. Co.*, 698.)

3. NEGLIGENCE—ERROR IN EXERCISE OF JUDGMENT.—Where, in the event of a child falling on the track in front of an approaching street railway car, the motorman may use either the brake or a particular appliance to govern the electric motor power, and it is impossible to say which would be the more effective under the circumstances, the motorman cannot be adjudged guilty of negligence for using the one in preference to the other. His employers are not responsible for an error in the exercise of his judgment. (*Stabenau v. Atlantic R. R. Co.*, 698.)

### RAPE.

1. RAPE—COERCION WITHOUT FORCE.—If by an array of physical force, without laying hands on a woman, a man so overpowers her that she dare not resist, her consent is void and his carnal intercourse is rape. (*Doyle v. State*, 159.)

2. RAPE—CONVICTION ON UNCORROBORATED TESTIMONY OF PROSECUTRIX.—The jury may convict the accused of rape on the uncorroborated testimony of the prosecutrix. (*Doyle v. State*, 159.)

3. RAPE—EVIDENCE OF PROSECUTRIX.—It is error to instruct the jury in prosecutions for rape that the evidence of the prosecutrix must be received with more than ordinary doubt and suspicion. (*Doyle v. State*, 159.)

4. RAPE—INSTRUCTION CONTAINING MATTER OF ARGUMENT.—It is not a rule of law that the jury must view rape as a most heinous offense calculated to create prejudice against the accused, nor that rape is, as a matter of law, an accusation easy to make and hard to be defended by the accused. This is matter of argument but not of instruction. (*Doyle v. State*, 159.)

5. RAPE.—INSTRUCTION as to the condition of prosecutrix at time of rape is a charge on the weight of evidence and erroneous. This is matter for the jury to determine from the evidence. (*Doyle v. State*, 159.)

### REAL PROPERTY.

See Mines and Mining, 4, 5; Negligence, 3.

### REASONABLE DOUBT.

See Instructions, 1.

### RECEIVERS.

1. CORPORATIONS, RECEIVERS. APPOINTMENT OF.—A receiver of a corporation may be appointed at the instance of one who brings himself within the provisions of section 2903 of the Civil Code of Iowa, declaring that a receiver may be appointed on the petition of either party to a civil action or proceeding, who shows he has a probable right to, or an interest in, any property which is the subject of the controversy, and that such property or its rents or profits are in danger of being lost or fatally injured or impaired, if the court is satisfied that the interest of one or both parties will be thereby promoted, and the substantial rights of neither unduly infringed. (*Wallace v. Pierce-Wallace Pub. Co.*, 389.)

2. **A RECEIVER OF AN INSOLVENT CORPORATION REPRESENTS ITS CREDITORS AS WELL AS ITS STOCKHOLDERS**, and holds the property for the benefit of both. He is a trustee for both, and a trustee for the creditors may maintain and defend actions which the corporation could not, and hence may avoid a mortgage or assignment of goods on any ground open to the creditors of the corporation. (*Franklin Nat. Bank v. Whitehead*, 302.)

3. **CORPORATIONS, TRUST FUNDS**.—When a court takes possession of the property of an insolvent corporation for administration and appoints a receiver, such property becomes a trust fund for the payment of its debts. (*Franklin Nat. Bank v. Whitehead*, 302.)

4. **RECEIVERS—INTEREST OF THE TRUST**.—The court will look rather to the interest of the trust than to that of the contractor. (*Brunner v. Central Glass Co.*, 339.)

5. **RECEIVER, INTERFERENCE WITH**.—When a receiver has purchased, but has not paid for, nor taken possession of, personal property, the vendor, in reselling it, cannot be regarded as in contempt of court nor as interfering with the possession of the receiver. (*Moore v. Potter*, 692.)

6. **RECEIVERS.—PARTIES DEALING WITH RECEIVERS MUST KNOW THEIR LIMITED POWERS** and that they are subject to the power creating them. (*Brunner v. Central Glass Co.*, 339.)

7. **RECEIVERS OF INSOLVENT CORPORATIONS MAY RESIST MORTGAGES AND ASSIGNMENTS** void because not acknowledged, recorded, nor accompanied by a delivery of the property mortgaged or assigned. (*Franklin Nat. Bank v. Whitehead*, 302.)

8. **JUDICIAL SALES.—A RECEIVER CANNOT BE APPOINTED TO COLLECT THE RENTS AND PROFITS** of land which has been sold at a judicial sale during the time while the effect of the order confirming the sale is suspended by an appeal therefrom. (*Pearson v. Gillenwaters*, 844.)

9. **CORPORATIONS.—WHEN A COURT APPOINTS A RECEIVER OF A CORPORATION ON ACCOUNT OF DISSENSIONS** in the governing body it will interfere for a limited time only, and to as small an extent as possible. (*Wallace v. Pierce-Wallace Pub. Co.*, 389.)

10. **A RECEIVER WILL NOT BE APPOINTED** of a corporation on account of disputes among its stockholders or the members of its board of directors or governing body, where the disagreement between its officers is not such as to render it impossible to carry on the business for which it was organized. (*Wallace v. Pierce-Wallace Pub. Co.*, 389.)

11. **CORPORATIONS, RECEIVERS.—A STOCKHOLDER WHO IS A CREDITOR OF A CORPORATION** has no right, on that ground, to have a receiver appointed where it is solvent and able to meet its obligations. (*Wallace v. Pierce-Wallace Pub. Co.*, 389.)

12. **A RECEIVER OF A CORPORATION WILL NOT BE APPOINTED** on the ground that it has but two stockholders owning an equal number of shares of stock, and owns stock in another corporation, respecting the management of which there is such disagreement between the stockholders in the first-named corporation that they cannot agree in any measures for the voting of such stock, or for the management of the second corporation, nor will a receiver be appointed of such stock alone. (*Wallace v. Pierce-Wallace Pub. Co.*, 389.)

**13. RECEIVERS, CREDITORS' RIGHT TO CONTEST CLAIMS AFTER THE APPOINTMENT OF.**—Where a receiver has been appointed of the property of an insolvent corporation, a general creditor having a lien thereon, has a right to intervene and contest the validity and priority of other claims or asserted liens. (*Franklin Nat. Bank v. Whitehead*, 302.)

**14. RECEIVERS—CORPORATION'S LIABILITY ON RECEIVER'S CONTRACTS.**—As a general rule, corporations are not subject to obligations or liabilities incurred by a receiver in charge of the corporate property. (*Brunner v. Central Glass Co.*, 339.)

**15. RECEIVERS' ENFORCEMENT OF CONTRACTS BY.**—The court will not allow a contractor to suffer loss for a contract made by receivers, but may refuse to direct its enforcement. (*Brunner v. Central Glass Co.*, 339.)

**16. RECEIVERS—ACTION ON BREACH OF CONTRACT—ALLOWANCE OF CLAIM—DISCRETION OF COURT.**—When a trial court is invested with the discretion of allowing or disallowing a claim, in an action for a breach of contract of a receiver, it is not an abuse of discretion for the court to disallow a claim for more material than could be used in a certain time, and where the contract price was greater than the market price. (*Brunner v. Central Glass Co.*, 339.)

**17. RECEIVER—DISCHARGE OF—LIABILITY OF PROPERTY FOR DEBT.**—The part of an order discharging a receiver, making the property liable for the receiver's debts, applies to such debts only as could be legally enforced. (*Brunner v. Central Glass Co.*, 339.)

**18. RECEIVER AND VENDOR, RIGHT TO RESELL PROPERTY TO ASCERTAIN DAMAGES.**—If a receiver purchases personal property, but fails to make payment therefor, the vendor may, as in the case of a sale to a private person, resell the property for the best price he can obtain, for the purpose of ascertaining his damages, and without first applying to the court for permission to make such sale. (*Moore v. Potter*, 692.)

#### RES JUDICATA.

See Judgment.

#### RESTRAINT OF TRADE.

See Contracts, 4-6.

#### RIPARIAN RIGHTS.

See Waters and Watercourses.

#### SALES.

**1. A VENDOR OF PERSONAL PROPERTY,** when the vendee declines to take and pay for it, ordinarily has the choice of any of three methods of indemnifying himself against loss: 1. He may store or retain the property for the vendee and sue him for the entire price; 2. He may sell the property and recover the difference between the contract price and the price obtained on the resale; or 3. He may keep the property as his own and recover the difference between the market value at the time and place of delivery and the contract price. (*Moore v. Potter*, 692.)

**2. SALES—FRAUDS OF THIRD PERSON.**—One induced to purchase property by misrepresentations made by third persons other than the vendor, and for whose acts the vendor is not responsible, is bound by his purchase, and cannot avoid notes given by him for the purchase price. (*Bank v. Looney*, 830.)



**3. SALE—VENDOR, WHETHER ACTS AS AGENT OF THE VENDEE IN MAKING A RESALE.**—Though it has sometimes been said that a vendor, in making a resale of the property when the vendee does not take and pay for it, acts as agent for the latter, this does not accurately describe their relations. The vendor is really acting for himself in disposing of the property for the purpose of ascertaining the actual damages he may sustain. He owes to the vendee, in making this sale, duties which, in some respect, resemble those of an agent in so far as he is required to exercise the same good faith which would be required of him as agent, in obtaining the best price, and in following any proper instructions which the vendee may give as to the time and manner in which the sale shall be made. (*Moore v. Potter*, 692.)

See Receivers, 5, 18.

#### SCHOLARSHIP.

See Execution, 6.

#### SHERIFFS.

See Attachment, 2, 4; Execution; Mortgage, 13.

#### SHORTHAND NOTES.

See Appeal, 6, 7.

#### SLANDER.

**1. SLANDER—WORDS ACTIONABLE PER SE.**—To say of the plaintiff that he swore to a lie before the aldermen is actionable per se. (*McGaw v. Hamilton*, 786.)

**2. SLANDER BY REMARKS BEFORE A LEGISLATIVE BODY.**—A member of a legislative body who, upon a judgment in favor of the plaintiff being referred to, without any motion being made respecting it, says the plaintiff swore to a lie in the course of the trial which resulted in the judgment, is liable for slander. The remark, under the circumstances, is not privileged, or at all events, it should be left to the jury to determine whether the utterance was malicious, wanton, and designed to injure plaintiff under the color of a privileged communication. (*McGaw v. Hamilton*, 786.)

**3. SLANDER—PRIVILEGED COMMUNICATIONS OR REMARKS IN THE LEGISLATIVE BODY, WHAT ARE.**—A member of a legislative body cannot take advantage of his official position to give expression to private slanders against others and then claim that his words were privileged. (*McGaw v. Hamilton*, 786.)

**4. SLANDER—PRIVILEGED COMMUNICATION, WHAT IS NOT.**—A communication to be privileged must be made upon a proper occasion from a proper motive, and must be based upon a reasonable and proper cause. (*McGaw v. Hamilton*, 786.)

**5. SLANDER—WORDS NOT ACTIONABLE PER SE—COLLOQUIUM—INNUENDO.**—The words "I know Sheets took wheat that did not belong to him" are not actionable per se, but are sufficient where there is a colloquium and innuendo averring that appellee was guilty of larceny, and that parties so understood appellant to mean. (*Hinesley v. Sheets*, 356.)

#### SPIRITUALISM.

See Wills, 8, 9.

**STATUTE OF LIMITATIONS.**

See Limitations of Actions.

**STATUTES.**

**1. STATUTES ADOPTED FROM ANOTHER STATE—CONSTRUCTION.**—If a statute of one state is adopted by another, the construction put upon the statute in the former will be adopted in the latter. (*Cowhick v. Shingle*, 17.)

**2. STATUTES—CONSTRUCTION OF, WHEN TAKEN FROM ANOTHER STATE.**—Although the construction put upon statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, yet such construction is not permitted to prevail when not in harmony with the spirit and policy of the legislation and decisions of the borrowing state. (*Oleson v. Wilson*, 639.)

**3. STATUTES—REPEAL—NO SAVING CLAUSE—EFFECT OF.**—It is a general rule that, after a statute is repealed, without a saving clause, the former repealed statute, in regard to its operative effect, is considered as if it had never existed, except as to matters and transactions past and closed. (*Mahoney v. State*, 64.)

**4. STATUTES—REPEAL—NO SAVING CLAUSE—EFFECT OF, AS TO PENDING PROSECUTION.**—If a statute repealing a former act does not contain a substantial re-enactment of the provisions of the old act, so that a suit or prosecution brought under the old statute may be finished under the new act, and such repeal takes place before the final action of the appellate court, pending proceedings in error therein from a judgment of conviction, the prosecution must be dismissed, or the judgment reversed. (*Mahoney v. State*, 64.)

**5. STATUTES—REPEAL—NO SAVING CLAUSE—EFFECT OF, AS TO PENDING PROSECUTION.**—If a statute permitting scabby sheep to be removed from point to point, with the permission of the sheep inspector, or without it, to a dipping corral, with the written consent of all sheep owners along the route, is repealed, without any re-enactment of the provisions of the old statute, and without any clause saving prosecutions under the former act, by a statute which permits no removal of diseased sheep at all, except upon the permission of the sheep inspector, and then only for the purpose of treatment for the disease, a new and distinct offense is created, the old statute is no longer in force, and, if such repeal takes place while a proceeding in error to reverse a judgment of conviction under the former act is pending before the appellate court, the judgment will, on motion, be set aside, and the defendant discharged. (*Mahoney v. State*, 64.)

**6. STATUTES—CONSTRUCTION—INVALID PROVISIONS.**—To arrive at the correct interpretation of an act claimed to be unconstitutional, the invalid portions of the act may be considered in construing its other provisions which are confessedly good. (*Swift v. Calnan*, 443.)

See Attachment, 1; Contracts, 1; Equity, 2; Insurance, 1; Judgment, 4; Mechanic's Lien, 1; Officers, 8; Party-walls; Railroad Companies, 1.

**STOCKHOLDERS.**

See Banks and Banking, 26, 27; Husband and Wife, 8.

**SUNDAY.**

See Judgment, 2.

**SUPERSTITIOUS USES.**

See Charities, 3.

**SURETYSHIP.**

1. **PRINCIPAL AND SURETY—ABSENCE OF SIGNATURE BY PRINCIPAL.**—The mere fact that the surety alone signed a note does not release him. (*Fassnacht v. Emsing Gagen Co.*, 322.)

2. **PRINCIPAL AND SURETY—CONCEALMENT OF FACTS BY PAYEE—FRAUD.**—If the surety signed as security, not knowing the exact amount, but supposing it was for the purchase price of certain goods, and the payee knew this to be the belief of the surety, but also knew that the amount included a pre-existing debt, his failure to inform the surety was in law a fraud that would release the surety from the entire contract. (*Fassnacht v. Emsing Gagen Co.*, 322.)

3. **PRINCIPAL AND SURETY—INSTRUCTION AS TO FACTS.**—It is error for the court to instruct the jury that the note in case "is a perfect note on its face, that it is a strong inference that the party signing the same did so as principal, and not otherwise." (*Fassnacht v. Emsing Gagen Co.*, 322.)

See Officers, 16-20.

**SURVIVORSHIP.**

See Executors and Administrators, 4.

**TAXES.**

1. **TAXATION—ASSESSMENT, WHO MAY MAKE.**—It is essential to the validity of a tax that the assessment be made by the officer authorized by law to make it. He must be either an officer de jure or de facto. (*City of Tampa v. Kaunitz*, 202.)

2. **ASSESSMENT—ILLEGAL ACT—FRAUD—GOOD FAITH.** An illegal act done with a fraudulent purpose avoids an assessment. An illegal act committed in good faith will not avoid an assessment. A legal assessment with an improper motive is not an assessment unlawfully made. (*City of Tampa v. Kaunitz*, 202.)

3. **TAXES—SPECIAL ASSESSMENT AND ORDINARY TAX—DISTINCTION.**—A special assessment for a local and permanent improvement, such as the construction of a large ditch for drainage purposes, though levied through the exercise of the taxing power, is not regarded as an annual or ordinary tax, but as an equivalent for benefits in the increased value of the property. (*Huston v. Tribbetts*, 275.)

4. **TAX TITLE, WHO MAY NOT ACQUIRE AND ASSERT.**—Where land is devised to A for life with remainder to B for life, and after B's death, the property to go to his heirs, and B accepts the devise, he cannot, by purchasing the property at a tax sale during the life of A, acquire any title which he can assert for the purpose of cutting off the interest of his heirs as remaindermen. It would be otherwise if he never accepted the devise. (*Defreese v. Lake*, 584.)

See Estates, 3-5; Interstate Commerce, 1; Mortgage, 18; Municipal Corporations, 10.

**TAX SALE.**

See Devise, 6.

**TAX TITLE.**

See Taxes, 4.



**TELEPHONE MESSAGE.**

See Evidence, 4.

**TRIAL.**

1. **JURY TRIAL.—A COURT IS NOT BOUND TO SUBMIT TO THE JURY MATTERS** which, if established, would constitute no legal defense to a recovery, or as to which there was no evidence. (*German Sav. Bank v. Citizens' Nat. Bank*, 399.)

2. **JURY TRIAL.—A COURT MAY PROPERLY REFUSE TO SUBMIT** to a jury interrogatories which, however answered, could not have controlled or changed the verdict, or have resulted in a finding necessarily determinative of the cause. (*German Sav. Bank v. Citizens' Nat. Bank*, 399.)

3. **JURY TRIAL—COERCING A VERDICT.**—Though, after the jurors have been out some twenty-two hours, the judge tells them that the cause was submitted to them for decision and not for disagreement, and that he will give them a further trial, he cannot be regarded as having coerced a verdict. (*German Sav. Bank v. Citizens' Nat. Bank*, 399.)

4. **TRIAL, CHANGE OF PLACE OF BECAUSE OF LOCAL PREJUDICE.**—Under the statutes of Iowa, a change of the place of trial because of local prejudice must be applied for before any continuance has been granted for any cause, unless the applicant was ignorant of such local prejudice at the time of the prior granting of the continuances. (*German Sav. Bank v. Citizens' Nat. Bank*, 399.)

5. **TRIAL—CRIMINAL CASES—CONTINUANCE TO PROCURE WITNESS—CONSTITUTIONAL LAW.**—It is error to refuse to grant a proper application for a continuance of a criminal case to procure the presence of a material witness for the accused, under a constitutional guaranty to persons prosecuted for crime, of the right to have compulsory process to compel the attendance of witnesses in their behalf. (*State v. Williams*, 869.)

6. **APPELLATE PRACTICE—CRIMINAL TRIALS.**—The failure of an appellant in a criminal case, who is in jail, to file his brief within the required time may be excused, and is not ground to dismiss his appeal, when his counsel has removed from the state and he files his brief as soon as he learns that it has not been filed. (*State v. Williams*, 869.)

7. **TRIAL—CRIMINAL CASES—COMPELLING WITNESS TO APPEAR IN MANACLES.**—It is error to require a witness for a person accused of crime to appear in court in manacles during the trial, although such witness, charged with the crime jointly with the accused, has been convicted upon a separate trial. (*State v. Williams*, 869.)

8. **TRIAL—CRIMINAL CASES—RIGHT OF ACCUSED TO APPEAR WITHOUT MANACLES.**—Unless some impelling necessity demands the restraint of a person accused of crime to secure the safety of others and his own custody, the act of compelling him to appear in manacles during his trial is not only a violation of the common law, but also a violation of a constitutional guaranty that "the accused shall have the right to appear and defend in person." (*State v. Williams*, 869.)

9. **TRIAL—OBJECTION TO INCOMPETENT WITNESS.**—If a witness is made, by statute, incompetent to testify at all, objection must be made when he is sworn. (*Winters v. Winters*, 428.)

10. **JURY TRIAL—SUFFICIENCY OF EVIDENCE.**—The jury are the sole judges of the sufficiency of the testimony and the veracity of the witnesses, and unless there is evidence that the jury

was improperly influenced, the court will not reverse the decision on the ground of insufficiency of evidence. (*Doyle v. State*, 159.)

11. TRIAL—DEPOSITION.—AN OBJECTION TO THE COMPETENCY OF EVIDENCE, taken on the hearing of a deposition, may be made for the first time at the trial. (*Winters v. Winters*, 428.)

12. TRIAL—DEPOSITION—OBJECTION TO COMPETENCY OF EVIDENCE—PRIVILEGED COMMUNICATIONS.—Under a statute providing that no exceptions to depositions other than for incompetency or irrelevancy can be regarded unless made by motion before the case is reached for trial, an exception to the deposition of a physician, on the ground that it reveals confidential communications, may be made for the first time at the trial, because the objection goes to the competency of the evidence, and not to the witness. (*Winters v. Winters*, 428.)

13. PRACTICE.—AFTER FINDINGS HAVE BEEN FILED and a judgment entered thereon, there is but one method by which the findings can be changed or modified, except, perhaps, in respect to a mere clerical error, and that is the mode pointed out by statute by the granting of a new trial. Until the findings are thus set aside, they must stand in their integrity as originally made. (*Hawxhurst v. Rathgeb*, 142.)

### TRUSTS.

1. A TRUST TO MANAGE PROPERTY and to pay over and deliver it to beneficiaries at a time specified implies that the trustees are to retain it in their control without authority to sell or otherwise dispose of it, and that it is to be delivered to the beneficiaries, so far as consistent with the nature of the property, in the same condition in which it was received by the trustees. If, however, the property consists of bonds and mortgages, payment thereof may be made to the trustees, who may reinvest the proceeds in other securities. (*Goad v. Montgomery*, 145.)

2. NEGOTIABLE INSTRUMENT—TRUSTEE'S LIABILITY AS INDORSER.—If a negotiable instrument is issued to A. B., trustee, and he subsequently indorses it, he is personally liable upon his indorsement. (*Bank v. Looney*, 830.)

3. NEGOTIABLE INSTRUMENTS.—THE FACT THAT THE WORD "TRUSTEE" is on the face of securities, cannot put the purchaser to any inquiry beyond ascertaining whether the trustee has power to sell or otherwise dispose of them. (*Bank v. Looney*, 830.)

4. A NEGOTIABLE INSTRUMENT made in favor of A. B., trustee, is none the less negotiable, and a purchaser thereof from the trustee is not charged with, nor subject to, equities existing in favor of the makers when the trustee, in disposing of the note, did not act in contravention of his trust. (*Bank v. Looney*, 830.)

5. TRUSTEES, POWER OF TO DISPOSE OF PROPERTY.—In the absence of any authority given expressly or by implication in an instrument creating a trust, property which has passed into the hands of the trustees to be held by them for a limited time must be kept by them and delivered in kind to the beneficiaries at the termination of the trust. (*Goad v. Montgomery*, 145.)

6. TRUSTS—REMEDY WHERE TRUST FUNDS ARE INTERMINGLED, OR DISSIPATED.—If trust moneys are mingled with those of the trustee, the trust may be impressed upon such fund or property with which it is mingled, but if it appears that the trust moneys are dissipated or lost, there is no fund to im-

**press with the trust, and the sole remedy of the beneficiary is a proceeding against the trustee personally.** (State v. Foster, 47.)

**7. TRUSTS—LIABILITY OF THE TRUSTEE AND OTHERS FOR DISSIPATING FUNDS OF THE TRUST ESTATE.**—All persons knowingly participating in, or aiding in, committing a breach of a trust, or in the misapplication of trust funds, are equally liable with the trustee to make good the fund by returning it to the trust estate. (Duckett v. Mechanics' Nat. Bank, 513.)

**8. OFFICERS—TREASURERS—DEPOSITARY OF PUBLIC MONEYS AS A QUASI TRUSTEE.**—If a state or county treasurer deposits public money, in his custody, with a bank, which keeps accounts with the respective treasurers as such, the banker, having knowledge of the trust character of the funds, becomes a quasi trustee, as he stands in the shoes of the depositing treasurers. (State v. Foster, 47.)

**9. TRUSTS — PAYMENTS—TRUST FUND—PRESUMPTION.** A trustee is presumed to have paid out his own moneys and to have kept those belonging to the trust, and this presumption is applied if there is any money on hand at the time the trust is sought to be enforced. Hence, if public moneys received by a state or county treasurer are deposited by him with a banker, who afterward assigns for the benefit of creditors, and most of the trust funds are found to be gone, what remains in the vaults of the bank, at the time of the assignment, as well as deposits made elsewhere, will be presumed to be trust funds, but the presumption does not apply to loans made before the assignment, and which pass by it to the assignee. (State v. Foster, 47.)

**10. TRUSTS—ASSIGNMENT OF PUBLIC MONEYS FOR BENEFIT OF CREDITORS.—IN FOLLOWING TRUST FUNDS,** they must first be traced to the estate of the trustee or quasi trustee, and the corpus of the funds must be found. Hence, if public moneys received by a state or county treasurer, and deposited by him with a banker, who afterward assigns for the benefit of creditors, are found to be on general, and not special, deposit, thus being thrown into the mass of the funds of the bank, and applied generally to the payment of debts, so that they can be traced no further than into the insolvent assignor's possession, and into his estate, the state or county can recover nothing but the amount of moneys on hand at the time of the assignment. (State v. Foster, 47.)

**11. TRUSTS—ASSIGNMENT OF PUBLIC MONEYS FOR BENEFIT OF CREDITORS—ACTION TO RECOVER.**—Moneys received by either a state or county treasurer are considered as public moneys, and, in case they are deposited with a banker, who afterward makes an assignment for the benefit of creditors, the state or county may maintain an action to have such moneys impressed with a trust, and recover the property, if it can be traced and identified. (State v. Foster, 47.)

**12. POWER OF SALE GIVEN TO EXECUTORS DOES NOT CONTINUE ON THEIR BECOMING TRUSTEES.**—If a testator by his will appoints certain persons executors, gives them power to sell, and also bequeaths and devises his estate to the same persons to hold in trust for his heirs, their power of sale ceases on their discharge as executors, after which time their powers must be measured by the decree distributing the property to them to hold in trust. (Goad v. Montgomery, 145.)

**13. MORTGAGES—DEED OF TRUST—TRUSTEES' RIGHT TO RELEASE—WHAT DOES NOT AFFECT.**—If land subject to a mortgage is purchased by two joint owners, one of whom assumes



the payment of the debt and gives to his co-owner a trust deed as security therefor, with power to release the deed upon payment of the debt, and the trustee afterward sues the grantor in the trust deed for partition and an accounting, the right of the trustee to satisfy the deed of trust cannot be abridged in such suit where the beneficiaries have not been made parties. Hence, a decree in such suit, that the grantor in the trust deed is bound to pay the mortgage, and that, on payment thereof, the clerk of the court shall satisfy the trust deed, does not deprive the trustee of the power to satisfy it; and the pendency of such suit is not notice to one who buys the land, relying upon a satisfaction of record made by the trustee. (*Day v. Brenton*, 460.)

14. **MORTGAGES—TRUST DEED—RELEASE BY TRUSTEE—DISCHARGE OF LIEN.**—As between the parties, or persons having notice, a release of a trust deed in the nature of a mortgage, executed by a trustee without authority of the cestui que trust, and without having received payment of the debt secured, does not discharge the mortgage lien. (*Day v. Brenton*, 460.)

15. **MORTGAGES—TRUST DEED—RELEASE BY TRUSTEE—DISCHARGE OF LIEN.**—If a trustee in a deed of trust, given to secure the payment of certain notes, has no authority to release the mortgage except upon the payment of the debt, but does have authority from the cestuis que trust to release it upon payment being made, a satisfaction and acknowledgment of record made by him after maturity of the debt will discharge the mortgage lien and protect a subsequent bona fide purchaser, relying upon the satisfaction, against the cestuis que trust and their assignees, although the mortgage debt has not actually been paid, as the purchaser is not obliged to go beyond the satisfaction piece appearing of record to see that the debt has, in fact, been paid. (*Day v. Brenton*, 460.)

See Banks and Banking, 14-19; Charities; Corporations, 7, 9; Devises, 1, 3; Executors and Administrators, 4; Limitations of Actions, 7; Receivers, 3, 4.

#### ULTRA VIRES.

See Banks and Banking, 25; Corporations, 3.

#### UNCONDITIONAL AND SOLE OWNERSHIP.

See Insurance, 5, 6.

#### UNDUE INFLUENCE.

See Wills, 16.

#### USAGE.

See Warehousemen, 6.

#### USURY.

1. **USURY—CONFLICT OF LAW.**—A note executed and payable in one state, secured by a mortgage on lands in another, will be governed by the rate of interest in the former; and if by the laws of such state all interest is forfeited for usury, the interest will be forfeited upon foreclosure proceedings in the state where the land is located. (*Thomson v. Kyle*, 193.)

2. **PLEADINGS.—USURY IN AND PAYMENTS UPON** a note secured by mortgage, when the amounts claimed are less than the mortgage debt, are matter of defense proper and not for a cross-bill. (*Thomson v. Kyle*, 193.)

**VENDOR AND PURCHASER.**

**1. VENDOR AND PURCHASER—TITLE OF REAL PROPERTY, WHEN NOT MARKETABLE.**—If an action has been commenced and a notice thereof filed apparently affecting the title of real property, and the complaint states a good cause of action, the title is not marketable, and the purchaser will not be compelled to accept it. He is not required to go outside and look up the evidence on which the action is based, and to determine whether or not it can be maintained. (*Simon v. Vandever*, 683.)

**2. VENDOR AND PURCHASER—VENDOR'S LIEN—TRANSITORY ACTION.**—An action to recover unpaid purchase money due under an absolute conveyance of real estate is transitory and not local. (*Smith v. Allen*, 864.)

**3. VENDOR AND PURCHASER—LIEN FOR UNPAID PURCHASE PRICE.**—Real property which has been conveyed by absolute deed is not subject to a vendor's lien for unpaid purchase money, where no such lien has been reserved by the deed or by any agreement between the parties. (*Smith v. Allen*, 864.)

**WAIVER.**

See Insurance, 13, 16-18; Witnesses, 2.

**WAREHOUSEMEN.**

**1. A WAREHOUSEMAN IS** a person who receives goods and merchandise to be stored in a warehouse for hire. (*Franklin Nat. Bank v. Whitehead*, 302.)

**2. WAREHOUSEMAN, WHO IS NOT.**—A corporation which never operated a warehouse, nor issued warehouse receipts, except upon its own property for the purpose of securing loans thereon, does not carry on the business of a warehouseman, either public or private. (*Franklin Nat. Bank v. Whitehead*, 302.)

**3. WAREHOUSE RECEIPTS, WHO MAY ISSUE.** It is only those persons who pursue the calling of a warehouseman, that is, receive and store goods in a warehouse as a business for profit, that have the power to issue a technical warehouse receipt, the transfer of which is a good delivery of the goods represented by it. (*Franklin Nat. Bank v. Whitehead*, 302.)

**4. CORPORATION, AUTHORITY OF TO CARRY ON BUSINESS AS A WAREHOUSEMAN.**—Though a statute declares that any person or incorporated company desiring to keep a public warehouse shall be entitled to do so upon receiving a permit therefor from the auditor of the county, it does not authorize the carrying on of the business of warehouseman by a corporation organized for an entirely different purpose, as, for instance, to carry on the business of manufacturing and selling nails and other products of steel and iron. (*Franklin Nat. Bank v. Whitehead*, 302.)

**5. A CORPORATION ORGANIZED TO MANUFACTURE NAILS AND OTHER PRODUCTS** of iron and steel is not authorized to engage in the business of a public warehouseman, nor to issue warehouse receipts. (*Franklin Nat. Bank v. Whitehead*, 302.)

**6. USAGE—CONSTRUCTION OF CONTRACT.**—Warehouseman's receipts for wheat received may be construed by adopting the meaning of the terms as explained by commercial usage. (*Drudge v. Leiter*, 359.)

**7. WAREHOUSEMAN'S RECEIPT—CONTRACT OF BAILMENT.**—A warehouseman's receipt for a certain amount of wheat in store, subject to warehouseman's charges, fire at owner's risk, is a contract of bailment. (*Drudge v. Leiter*, 359.)

8. **WAREHOUSE RECEIPT ISSUED WITHOUT AUTHORITY AS COLLATERAL.**—If a debtor who is not a warehouseman issues a receipt purporting to be a warehouse receipt on property in his possession and owned by him, for the sole purpose of securing a credit, it is not in any sense a warehouse receipt. (Franklin Nat. Bank v. Whitehead, 302.)

9. **WAREHOUSE RECEIPTS ISSUED UPON WAREHOUSEMAN'S OWN PROPERTY.**—What purports to be a warehouse receipt issued by a corporation upon its own property, which remains in its possession, for the purpose of securing a loan made to it, does not create any lien, and is void under a statute declaring that no assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee, unless such assignment or mortgage shall be duly acknowledged and recorded. (Franklin Nat. Bank v. Whitehead, 302.)

10. **ESTOPPEL AGAINST CONTESTING WAREHOUSE RECEIPT.**—One who is not a warehouseman, but who issues what purports to be a warehouse receipt on his own property for the purpose of securing a creditor, is not estopped from proving that he was never a warehouseman, where the creditor had knowledge of the true state of facts, and was not deceived by any action of the debtor. (Franklin Nat. Bank v. Whitehead, 302.)

11. **WAREHOUSEMAN—OWNERSHIP OF MINGLED GRAIN --TENANTS IN COMMON.**—Where a warehouseman receives grain and mixes it with his grain, or that of others, and is engaged in selling the grain so mixed, the various owners of the grains are tenants in common of the entire quantity of the commingled grain. (Drudge v. Leiter, 359.)

12. **WAREHOUSEMAN'S LIABILITY—FIRE—WHEAT SOLD.** While warehouseman would not be liable for wheat destroyed by fire, he would be responsible for wheat sold, and not represented by wheat destroyed. Depositor could recover for the difference between the amount represented by the receipt and his individual share of the destroyed wheat. (Drudge v. Leiter, 359.)

See Corporations, 2; Cotenancy, 1, 2; Pledge, 1.

## WATER COMPANIES.

1. **CORPORATIONS.—WATER COMPANIES ARE PUBLIC CORPORATIONS** when chartered under the general laws of the state, and given the right of eminent domain, and the powers, privileges, and franchises of operating waterworks to furnish a city and its inhabitants with water. (Watauga Water Co. v. Wolfe, 841.)

2. **A WATER COMPANY CANNOT, AT ITS ELECTION AND WITHOUT GOOD REASON,** serve one part of the community and not another. It is bound to furnish water without discrimination to inhabitants of the city. (Watauga Water Co. v. Wolfe, 841.)

3. **A WATER COMPANY MAY ADOPT REASONABLE RULES** for the conduct of its business and the operation of its plant, and such rules, so far as they affect its patrons, are binding upon them, and may be enforced by the company to the extent of refusing to supply water to those who refuse to comply therewith. (Watauga Water Co. v. Wolfe, 841.)

4. **WATER COMPANIES—RULES AND REGULATIONS.**—A person desiring to be furnished with water by a public water company may be required, as a condition precedent, to sign an agreement to keep his hydrants closed except when using water, and, refusing to sign such agreement, the company may withhold water from him. (Watauga Water Co. v. Wolfe, 841.)



5. A WATER COMPANY MAY, FOR HIS WASTING OF WATER, shut it off from the premises of a consumer. (*Watauga Water Co. v. Wolfe*, 841.)

### WATERS AND WATERCOURSES.

1. THE RIGHTS OF RIPARIAN OWNERS to the use of the waters of a non-navigable stream for an artificial purpose are equal. Each has a right to the reasonable use of the water having reference to the rights of the other therein. (*Gehlen v. Knorr*, 416.)

2. RIPARIAN OWNERS, RIGHTS OF.—The general rule is, that an owner of land through which a stream of water flows has the right to have it flow over his land in the natural channel, undiminished in quantity and unimpaired in quality, except in so far as diminution or contamination is inseparable from a reasonable use of such water. (*Gehlen v. Knorr*, 416.)

3. RIPARIAN OWNERS, RIGHT OF TO DETAIN WATER.—A riparian owner may reasonably detain water for a proper purpose, though in so doing he affects the current and retards the flow to some extent. (*Gehlen v. Knorr*, 416.)

4. ICE, RIGHT OF RIPARIAN OWNERS TO.—A riparian owner has the same right to ice that he has to the water before it was frozen, and may cut and remove it from the stream in any quantity and to any extent for his own use or for storage or sale, if he does not thereby appreciably diminish the head of water at the dam of the lower proprietor. (*Gehlen v. Knorr*, 416.)

5. RIPARIAN OWNERS—ICE, RIGHT OF TO FILL RESERVOIRS AND RETAIN WATER FOR THE PURPOSE OF TAKING.—A riparian owner has the right to divert the waters of a stream into a pond or other reservoir and detain them for the purpose of taking ice therefrom, provided he thereby and by the taking of the ice does not unreasonably diminish the flow of the stream. The detention of the water for two or three days while the pond was filling cannot be regarded as unreasonable. (*Gehlen v. Knorr*, 416.)

6. RIPARIAN OWNERS, RIGHT OF TO USE PONDS AND OTHER RESERVOIRS.—A riparian owner may, by the use of a dam or otherwise, retard or divert waters of a stream, so far as necessary to fill a pond or other reservoir and to thereby store water for use as a power for a mill or for any other useful purpose, though the flow of the water to the lands of a lower proprietor is thereby somewhat diminished, because more of the water is lost by evaporation and by soaking into the ground, than when it was left to flow without obstruction in the natural channel. (*Gehlen v. Knorr*, 416.)

7. RIPARIAN OWNERS—CONDEMNATION PROCEEDINGS. Where proceedings were brought by a person who was about to erect a dam against persons owning land adjacent to the river, and resulted in a judgment as to one of such persons that he was not entitled to receive anything, it is fair to presume that such judgment was based upon the theory that the backwater from the dam would not overflow nor injuriously affect his lands. Therefore, such judgment does not give the plaintiff any right as against such landowner to the water itself, or its use, which is not enjoyed by riparian owners generally. (*Gehlen v. Knorr*, 416.)

See *Mines and Mining*, 1.

### WILLFUL INJURY.

See *Damages*, 1.

## WILLS.

1. **WILLS—TESTAMENTARY CAPACITY.**—Where monomania or insane delusion dictates the provisions of a will resulting in the disinheriting of the subjects of the delusion, whom the testator otherwise would remember in his will, it cannot stand. (*Rivard v. Rivard*, 566.)

2. **WILLS, EVIDENCE.**—That a will is contrary to natural justice may be considered with other facts to aid in determining whether it is the fruit of undue influence or insane delusion. (*Rivard v. Rivard*, 566.)

3. **WILLS—TESTAMENTARY CAPACITY, TERMS OF WILL, WHEN MAY BE CONSIDERED.**—The jury may be instructed that they may consider the terms of a will in connection with other evidence in determining whether it was the fruit of monomania or insane delusion. (*Rivard v. Rivard*, 566.)

4. **WILLS.**—If a testator is under an insane delusion that his daughter is an inmate of a house of ill-fame, such delusion, if the jury finds it to have been the cause of his disinheriting her, is sufficient to invalidate the will. (*Rivard v. Rivard*, 566.)

5. **INSANE DELUSIONS, EFFECT OF UPON TESTAMENTARY CAPACITY.**—A testator may have been competent to attend to his affairs, to make deeds, leases, and other contracts, and still not able to execute the will in question, because of some delusion which had beclouded or taken away his judgment in regard to those who were the natural objects of his bounty, as where he disinherits one of his heirs at law on account of his having a delusion respecting the character of such heir, or respecting some act on the part of the heir which, if existing, shows him to be unworthy of the testator's bounty. (*Rivard v. Rivard*, 566.)

6. **AN INSANE DELUSION** on the part of a testator that one of his daughters is a prostitute, one of his sons a drunkard, and that his son in law had designs on his life, is sufficient to justify a verdict against the validity of the will. (*Rivard v. Rivard*, 566.)

7. **WILLS—INVALIDITY—INSANE DELUSIONS.**—Although a testatrix may possess sufficient mental capacity to transact ordinary business, and have sufficient mental capacity, at the time she signs her will, to know and understand the business in which she is engaged, yet she is wholly incapable of making a will if, at the time, she is under the influence of an insane delusion. (*Orchardson v. Cofield*, 211.)

8. **WILLS—INVALIDITY—INSANE DELUSIONS—SPIRITUALISM.**—If a man, fifty-seven years of age, professing to be a spiritualist, leads a feeble woman, eighty-three years of age, possessed of an abundance of money and other property, to believe that he is a god, a Christ, or one gifted with supernatural powers, and she marries him under the insane delusion that the spirit of her dead husband, long deceased, dictates and approves of the marriage, and makes a will in such impostor's favor while she labors under the influences of such insane delusions, brought upon her through his machinations, a court will set the will aside. (*Orchardson v. Cofield*, 211.)

9. **WILLS—INVALIDITY—INSANE DELUSIONS—SPIRITUALISM.**—A mere belief in spiritualism is not proof of insanity or want of testamentary capacity, yet, if through that belief, one is led into the delusion that another is a god, a Christ, or gifted with supernatural powers, the believer of the delusion is insane on that subject, and his will, prompted by such delusion, and made under its influence, cannot be sustained, although the testator may have been sane on all other subjects. (*Orchardson v. Cofield*, 211.)

10. **WILLS—INVALIDITY—INSANE DELUSIONS.**—If a will is made as the result of an insane delusion in regard to one who is an object of the testator's bounty, or in regard to the duty or moral obligation of a party to make a will in favor of a particular individual, corporation, or society, it cannot be sustained. (*Orchardson v. Cofield*, 211.)

11. **WILLS—EXTRINSIC EVIDENCE** of what the testator told the scrivener whom he engaged to draw his will, and of his intentions as then expressed, is not admissible for the purpose of construing such will where, upon its face, it is free from ambiguity. (*De-freese v. Lake*, 584.)

12. **WILLS—EVIDENCE OF TESTAMENTARY CAPACITY.**—Capacity to transact ordinary business, and to know and understand the business in which one is engaged at the time of making a will, is evidence of testamentary capacity, unless the testator was, at that time, affected with some insane delusion which influenced his action. (*Orchardson v. Cofield*, 211.)

13. **WITNESS, COMPETENCY OF TO GIVE OPINION AS TO SANITY.**—A witness who describes actions, looks, and language of the testator inconsistent with a rational state of mind, is competent to state his opinion respecting the sanity of the testator. (*Rivard v. Rivard*, 566.)

14. **WITNESSES — PHYSICIAN—ADMISSIBILITY OF PRIVILEGED COMMUNICATION ON PROBATE AND CONTEST OF WILL.**—In a contest over the proof of a will, where there is a dispute, as to the testamentary capacity of the testator, between the devisee or legal representative, and the heirs at law, all claiming under the deceased, the attending physician may be called as a witness, by either party, and examined as to information acquired in his professional capacity, although the statute prohibits the disclosure of such information unless the party for whose benefit the prohibition is made waives his right thereunder. The privilege cannot be urged, in such a case, because the proceedings are not adverse to the estate, and the interest of the deceased as well as of the estate is, that the truth be ascertained; but the court may, in its discretion, and where necessary, prevent the memory of the dead from being blackened by such testimony. (*Winters v. Winters*, 428.)

15. **PRACTICE.**—An objection to testimony showing that in the opinion of witness the testator was of unsound mind, that such testimony is incompetent, is too indefinite, because it may include reasons which counsel had in mind, but which were not apparent to the court. Counsel cannot, in an appellate court, insist that the testimony was incompetent, because the witness had not shown sufficient knowledge upon which to base his opinion. (*Rivard v. Rivard*, 566.)

16. **WILLS, UNDUE INFLUENCE, WHAT SUFFICIENT TO SUPPORT A FINDING OF.**—If a testator possessed of great wealth makes a will in which his property is devised with substantial equality among his heirs at law, and subsequently by codicils, to the will and by conveyances, practically disinherits all of them but two, those two being less in need of his bounty than some of those disinherited, and it appears that one of the sons in whose favor the changes in the will were made resided with the testator for several years prior to his death, and the other was frequently a visitor of, and in consultation with, the testator, and that after interviews between them, he spoke unfavorably of the third son, a verdict finding that the will was the product of undue influence will not be set aside. (*Rivard v. Rivard*, 566.)



**17. JURY TRIAL—INSTRUCTION AS TO WEIGHT OF EVIDENCE.**—A court before which the competency of a testator is being tried, does not err in refusing to instruct the jury that the expert testimony in the case is uncertain, unreliable, and entitled to but little weight. (*Rivard v. Rivard*, 566.)

**18. INSANITY—MORAL OBLIGATIONS.**—It is not error to permit a medical witness to be asked whether he thought the testator to be capable of understanding his moral obligations to others at the time of executing his will, if the testimony shows that he then had minor children dependent on him or his property for education and support. (*Rivard v. Rivard*, 566.)

See Appeal, 12, 17; Distribution, 1, 2.

#### WITNESSES.

**1. WITNESSES.—A CROSS-EXAMINATION** must be confined to the matters about which the direct testimony was given. (*State v. Eifert*, 433.)

**2. WITNESSES—CROSS-EXAMINATION—WAIVER OF ERROR.**—If a defendant is required, on cross-examination, and against his objection, to testify to certain facts, any error connected with such cross-examination, even if it is improper, is waived by the defendant where he, in the further progress of the trial, testifies to the same facts without objection. (*State v. Eifert*, 433.)

**3. WITNESSES — CROSS-EXAMINATION — FRAUDULENT BANKING.**—If a banker, upon an indictment for fraudulent banking, in accepting a deposit, knowing himself to be insolvent, attempts to show his want of connection with the transaction charged by testifying that early on the morning of the day when the deposit was made, he left the town where his bank was located, and went to a city named; that, prior to going, he had a conversation with his son about receiving deposits on that day; that he told him he was going to the place named to look the ground over; that, if things did not look favorable, he would send the son a telephone message, not to receive any more deposits, and to stop doing business; and that he did send him such a message—the cross-examination need not be confined to what the defendant did at the city named, but may be extended to any matter which tends to contradict his testimony in chief, or which more fully discloses his connection with the deposit. (*State v. Eifert*, 433.)

See Appeal, 10, 11; Trial, 9; Wills, 13.









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